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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 910

[Lemon Regulation 714]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 714 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 350,000 cartons during the period from April 22, 1990, through April 28, 1990. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

DATES: Regulation 714 (7 CFR part 910) is effective for the period from April 22, 1990, through April 28, 1990.

FOR FURTHER INFORMATION CONTACT: Beatriz Rodriguez, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone (202) 475-3861.

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory action to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 85 handlers of lemons grown in California and Arizona subject to regulation under the lemon marketing order and approximately 2,500 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of handlers and producers of California-Arizona lemons may be classified as small entities.

This regulation is issued under Marketing Order No. 910, as amended (7 CFR part 910), regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act (the "Act," 7 U.S.C. 601-674), as amended. This action is based upon the recommendation and information submitted by the Lemon Administrative Committee (Committee) and upon other available information. It is found that this action will tend to effectuate the declared policy of the Act.

This regulation is consistent with the California-Arizona lemon marketing policy for 1989-90. The Committee met publicly on April 17, 1990, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and unanimously recommended a quantity of lemons deemed advisable to be handled during the specified week. The Committee reports that overall demand for lemons is good.

Pursuant to 5 U.S.C. 553, it is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. It is necessary, in order to effectuate the declared purposes of the Act, to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 910

Lemons, Marketing agreements, and Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 910 is amended as follows:

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR part 910 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

Note: This section will not appear in the Code of Federal Regulations.)

2. Section 910.714 is added to read as follows:

§ 910.714 Lemon Regulation 714.

The quantity of lemons grown in California and Arizona which may be handled during the period from April 22, 1990, through April 28, 1990, is established at 350,000 cartons.

Dated: April 18, 1990.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 90-9354 Filed 4-19-90; 8:45 am]
BILLING CODE 3410-02-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 37141

[Docket No. RM89-15-000]

Generic Determination of Rate of Return on Common Equity for Public Utilities

April 16, 1990.

AGENCY: Federal Energy Regulatory Commission, Energy.

ACTION: Notice of benchmark rate of return on common equity for public utilities.

SUMMARY: In accordance with § 37.5 of its regulations, the Federal Energy Regulatory Commission, by its designee, the Director of the Office of Economic Policy, issues the update to the benchmark rate of return on common equity applicable to rate filings made during the period May 1, 1990 through July 31, 1990. This benchmark rate is set at 11.85 percent.

EFFECTIVE DATE: May 1, 1990.

FOR FURTHER INFORMATION CONTACT: Marvin Rosenberg, Office of Economic Policy, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 208–1283.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 3308 at the Commission's Headquarters, 941 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208–1397. To access CIPS, set your communications software to use 300, 1200, or 2400 baud, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this notice will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in Room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

Notice of Benchmark Rate of Return on Common Equity for Public Utilities

Issued April 16, 1990.

On December 26, 1989, the Federal Energy Regulatory Commission (Commission) issued a final rule (Order No. 517) concerning the generic determination of the rate of return on common equity for public utilities.[1] In several earlier rulemaking proceedings, the Commission established a discounted cash flow (DCF) formula to determine the average cost of common equity and a quarterly indexing procedure to calculate benchmark rates of return on common equity for public utilities and codified the formula and procedure at § 37.9 of its regulations.[2] In Order No. 517, the Commission determined that 4.3 percent is an appropriate expected annual dividend growth rate for use in the quarterly indexing procedure during the 12 months beginning May 1, 1990 and that 0.02 is an approximate flotation cost adjustment factor for that period.

The Commission, by its designee, the Director of the Office of Economic Policy, uses the quarterly indexing procedure to determine that the benchmark rate of return on common equity applicable to rate filings made during the period May 1, 1990 through July 31, 1990 is 11.85 percent.

Section 37.9 of the Commission's regulations requires that the quarterly benchmark rate of return be set equal to the average cost of common equity for the jurisdictional operations of public utilities. This average cost is based on the average of the median dividend yields for the two most recent calendar quarters for a sample of 98 utilities. The average yield is used in the following formula with fixed adjustment factors (determined in the most recent annual proceeding) to determine the cost rate:

$$k_t = 1.02\ Y_t + 4.32$$

where k_t is the average cost of common equity and Y_t is the average dividend yield.

The attached appendix provides the supporting data for this update. The median dividend yields for the sample of utilities for the fourth quarter of 1989 and the first quarter of 1990 are 7.27 percent and 7.48, respectively. The average yield for those two quarters is 7.38 percent. Use of the average dividend yield in the above formula produces an average cost of common equity of 11.85 percent.

This notice supplements the generic rate of return rule announced in Order No. 517, issued December 26, 1989 and effective on February 1, 1990.

List of Subjects in 18 CFR Part 37

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends part 37, chapter I, title 18 of the Code of Federal Regulations, as set forth below, effective May 1, 1990.

Richard P. O'Neill,

Director, Office of Economic Policy.

PART 37—GENERIC DETERMINATION OF RATE OF RETURN ON COMMON EQUITY FOR PUBLIC UTILITIES

1. The authority citation for part 37 continues to read as follows:

Authority: Federal Power Act, 16 U.S.C. 791a–825r (1982); Department of Energy Organization Act, 42 U.S.C. 7101–7352 (1982).

2. In § 37.9, paragraph (d) is revised to read as follows:

§ 37.9 Quarterly indexing procedure.

* * * * *

(d) *Table of quarterly benchmark rates of return.* The following table presents the quarterly benchmark rates of return on common equity:

Benchmark applicability period	Dividend increase adjustment factor	Expected growth adjustment factor	Current dividend yield	Cost of common equity	Benchmark rate of return
(t)	(a)	(b)	(Y_t)	(k_t)	
2/1/86–4/30/86	1.02	4.54	9.03	13.75	13.75
5/1/86–7/31/86	1.02	4.54	8.37	13.08	13.25
8/1/86–10/31/86	1.02	4.54	7.49	12.18	12.75
11/1/86–1/31/87	1.02	4.54	6.75	11.43	12.25
2/1/87–4/30/87	1.02	4.63	6.44	11.20	11.20
5/1/87–7/31/87	1.02	4.63	6.54	11.30	11.30
8/1/87–10/31/87	1.02	4.63	6.97	11.74	11.74
11/1/87–1/31/88	1.02	4.63	7.49	12.27	12.27
2/1/88–4/30/88	1.02	4.36	7.90	12.42	12.42

[1] Generic Determination of Rate of Return on Common Equity for Public Utilities, Order No. 517, 55 FR 146, (Jan. 3, 1990), FERC Stats. and Regs. ¶ 30,871 (Dec. 26, 1989).

[2] 18 CFR 37.9 (1989). The most recent adoption of the DCF formula and quarterly indexing procedure came in Order No. 489, 53 FR 3342 (Feb. 5, 1988).

Benchmark applicability period	Dividend increase adjustment factor	Expected growth adjustment factor	Current dividend yield	Cost of common equity	Benchmark rate of return
(t)	(a)	(b)	(Y_t)	(k_t)	
5/1/88–7/31/88	1.02	4.36	7.99	12.51	12.51
8/1/88–10/31/88	1.02	4.36	7.84	12.36	12.36
11/1/88–1/31/89	1.02	4.36	7.92	12.44	12.44
2/1/89–4/30/89	1.02	4.33	7.89	12.38	12.38
5/1/89–7/31/89	1.02	4.33	7.95	12.44	12.44
8/1/89–10/31/89	1.02	4.33	7.94	12.43	12.43
11/1/89–1/31/90	1.02	4.33	7.56	12.04	12.04
2/1/90–4/30/90	1.02	4.32	7.28	11.75	11.75
5/1/90–7/31/90	1.02	4.32	7.38	11.85	11.85

Note: The Appendix will not be published in Code of Federal Regulations.

Appendix

Exhibit No.	Title
1	Initial sample of utilities
2	Utilities excluded from the sample for the indicated quarter due to either zero dividends or a reduction in dividends for this quarter or the prior three quarters
3	Annualized dividend yields for the indicated quarter for utilities retained in the sample

Source of Data: Standard and Poor's Compustat Services, Inc., Utility COMPUSTAT II Quarterly Data Base.

Exhibit 1—Sample of Utilities

Utility	Ticker Symbol	Industry Code
Allegheny Power System	AYP	4911
American Electric Power	AEP	4911
Atlantic Energy, Inc	ATE	4911
Baltimore Gas & Electric	BGE	4931
Black Hills, Corp	BKH	4911
Boston Edison, Co	BSE	4911
Carolina Power & Light	CPL	4911
Centerior Energy, Corp	CX	4911
Central & South West, Corp	CSR	4911
Central Hudson Gas & Electric	CNH	4931
Central Ill Public Service	CIP	4931
Central Louisiana Electric	CNL	4911
Central Maine Power, Co	CTP	4911
Central Vermont Pub Service	CV	4911
Cilcorp Inc	CER	4931
Cincinnati Gas & Electric	CIN	4931
CMS Energy, Corp	CMS	4931
Commonwealth Edison	CWE	4911
Commonwealth Energy System	CES	4931

Exhibit 1—Sample of Utilities—Continued

Utility	Ticker Symbol	Industry Code
Consolidated Edison of NY	ED	4931
Delmarva Power & Light	DEW	4931
Detroit Edison, Co	DTE	4911
Dominion Resources, Inc	D	4931
DPL, Inc	DPL	4931
DQE, Inc	DQE	4911
Duke Power, Co	DUK	4911
Eastern Utilities Association	EUA	4911
Empire District Electric	EDE	4911
Entergy, Corp	ETR	4911
Fitchburg Gas & Electric Light	FGE	4931
Florida Progress, Corp	FPC	4911
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Iowa-Illinois Gas & Electric	IWG	4931
Ipalco Enterprises, Inc	IPL	4911
Kansas City Power & Light	KLT	4911
Kansas Gas & Electric	KGE	4911
Kansas Power & Light	KAN	4931
Kentucky Utilities, Co	KU	4911
Long Island Lighting	LIL	4931
Louisville Gas & Electric	LOU	4931
Maine Public Service	MAP	4911
Midwest Energy, Co	MWE	4931
Minnesota Power & Light	MPL	4911
Montana Power, Co	MTP	4931
NECO Enterprises, Inc	NPT	4911
Nevada Power, Co	NVP	4911
New England Electric System	NES	4911
New York State Electric & Gas	NGE	4931
Niagara Mohawk Power	NMK	4931
NIPSCO Industries, Inc	NI	4931

Exhibit 1—Sample of Utilities—Continued

Utility	Ticker Symbol	Industry Code
Northeast Utilities	NU	4911
Northern States Power-MN	NSP	4931
Ohio Edison, Co	OEC	4911
Oklahoma Gas & Electric	OGE	4911
Orange & Rockland Utilities	ORU	4931
Pacific Gas & Electric	PCG	4931
Pacificorp	PPW	4931
Pennsylvania Power & Light	PPL	4911
Philadelphia Electric, Co	PE	4931
Pinnacle West Capital	PNW	4911
Portland General, Corp	PGN	4911
Potomac Electric Power	POM	4911
PSI Holdings, Inc	PIN	4911
Public Service, Co. of Colo	PSR	4931
Public Service, Co. of NH	PNH	4911
Public Service, Co. of N ME	PNM	4931
Public Service Entrp	PEG	4931
Puget Sound Power & Light	PSD	4911
Rochester Gas & Electric	RGS	4931
San Diego Gas & Electric	SDO	4931
Scana, Corp	SCG	4931
Scecorp	SCE	4911
Sierra Pacific Reserve	SRP	4931
Southern, Co	SO	4911
Southern Indiana Gas & Electric	SIG	4931
St. Joseph Light & Power	SAJ	4931
Teco Energy, Inc	TE	4911
Texas Utilities, Co	TXU	4911
TNP Enterprises, Inc	TNP	4911
Tucson Electric Power, Co	TEP	4911
Union Electric, Co	UEP	4911
United Illuminating Co	UIL	4911
Unitil Corp	UTL	4911
Utilicorp United, Inc	UCU	4931
Washington Water Power	WWP	4931
Wisconsin Energy, Corp	WEC	4931
Wisconsin Public Service	WPS	4931
WPL Holdings, Inc	WPH	4931

N = 98.

Exhibit 2—Utilities Excluded From the Sample for the Indicated Quarter Due to Either Zero Dividends or a Cut in the Dividends for This Quarter or the Prior Three Quarters

[Year = 90 Quarter = 1]

Ticker Symbol	Utility	Reason for Exclusion
BSE	Boston Edison Co	Dividend rate was reduced for the quarter CALENDAR 90Q1.
CMS	CMS Energy Corp	Dividend rate was zero for quarter CALENDAR 89Q3.
GSU	Gulf States Utilities Co	Dividend rate was zero for quarter CALENDAR 90Q1.
IPC	Illinois Power Co	Dividend rate was zero for quarter CALENDAR 90Q1.
LIL	Long Island Lighting	Dividend rate was zero for quarter CALENDAR 89Q2.
NMK	Niagara Mohawk Power	Dividend rate was zero for quarter CALENDAR 90Q1.
PNW	Pinnacle West Capital	Dividend rate was zero for quarter CALENDAR 90Q1.
PGN	Portland General Corp	Dividend rate was reduced for the quarter CALENDAR 90Q1.

EXHIBIT 2—UTILITIES EXCLUDED FROM THE SAMPLE FOR THE INDICATED QUARTER DUE TO EITHER ZERO DIVIDENDS OR A CUT IN THE DIVIDENDS FOR THIS QUARTER OR THE PRIOR THREE QUARTERS—Continued

[Year = 90 Quarter = 1]

Ticker Symbol	Utility	Reason for Exclusion
PNH	Public Service Co of NH	Dividend rate was zero for quarter CALENDAR 90Q1.
PNM	Public Service Co of N ME	Dividend rate was zero for quarter CALENDAR 90Q1.
TEP	Tucson Electric Power Co	Dividend rate was zero for quarter CALENDAR 90Q1.

N=11.

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Exhibit 3
Annualized Dividend Yields for the Indicated Quarter for
Utilities Retained in the Sample

Year = 90 Quarter = 1

Ticker Symbol	Price,1st Month of Qtr-High	Price,1st Month of Qtr-Low	Price,2nd Month of Qtr-High	Price,2nd Month of Qtr-Low	Price,3rd Month of Qtr-High	Price,3rd Month of Qtr-Low	Average Price	Dividends Annual Rate	Annualized Dividend Yield
AEP	33.125	30.250	31.125	29.375	30.750	30.000	30.771	2.400	7.800
ATE	38.500	35.500	37.750	36.125	38.125	35.750	36.958	2.880	7.793
AYP	42.125	39.500	40.250	39.125	41.000	38.875	40.146	3.160	7.871
BGE	34.625	30.625	31.875	30.500	31.875	29.375	31.479	2.100	6.671
BKH	29.000	26.875	27.625	26.500	29.250	27.375	27.771	1.640	5.905
CER	38.625	33.750	35.000	33.625	35.250	34.250	35.083	2.460	7.012
CES	39.000	34.500	37.750	34.500	38.750	36.250	36.792	2.800	7.610
CIN	31.750	30.125	31.625	30.000	31.375	29.625	30.750	2.400	7.805
CIP	23.125	21.750	23.250	21.625	22.500	21.500	22.292	1.800	8.075
CNH	23.875	21.875	23.875	22.125	23.625	22.125	22.917	1.760	7.680
CNL	35.750	33.000	34.125	32.250	34.000	32.625	33.625	2.440	7.257
CPL	47.625	42.750	44.750	43.000	45.250	43.000	44.396	2.920	6.577
CSR	40.125	37.750	39.875	37.375	39.000	37.375	38.583	2.760	7.153
CTP	20.625	18.375	19.250	18.375	19.625	18.875	19.187	1.560	8.130
CV	29.250	26.625	28.625	26.750	29.500	26.750	27.917	2.040	7.307
CWE	37.875	35.125	36.625	34.500	35.875	33.625	35.604	3.000	8.426
CX	21.125	18.000	19.875	18.625	19.500	19.000	19.354	1.600	8.267
D	48.625	43.875	46.500	44.125	45.125	43.875	45.354	3.320	7.320
DEW	21.375	19.125	20.250	19.500	20.250	19.250	19.958	1.540	7.716
DPL	30.625	29.000	30.375	29.125	29.625	28.500	29.542	2.340	7.921
DQE	23.875	21.125	21.750	20.500	21.125	20.375	21.458	1.360	6.338
DTE	25.625	23.500	25.625	24.625	26.125	24.625	25.021	1.780	7.114
DUK	56.375	51.000	54.875	52.500	56.125	51.625	53.750	3.120	5.805
ED	29.250	25.250	27.875	25.125	26.875	25.250	26.604	1.820	6.841
EDE	31.125	30.000	31.250	29.625	31.125	29.750	30.479	2.320	7.612
ETR	23.625	21.125	21.875	19.500	21.000	20.000	21.187	1.000	4.720
EUA	41.500	36.750	37.250	34.250	37.500	33.125	36.729	2.500	6.807
FGE	32.250	30.000	32.000	31.000	31.500	30.500	31.208	2.000	6.409
FPC	40.500	37.125	38.500	37.000	38.125	37.375	38.104	2.640	6.928
FPL	36.500	33.000	34.500	32.250	33.500	31.750	33.583	2.280	6.789
GMP	27.125	25.750	26.250	25.625	26.250	25.125	26.021	1.980	7.609
GPU	47.250	44.250	46.750	44.375	46.500	43.500	45.437	2.200	4.842
HE	40.000	36.500	37.000	35.625	36.625	35.250	36.833	2.160	5.864
HOU	35.250	32.875	34.500	32.500	34.125	32.625	33.646	2.960	8.798
IDA	29.375	26.750	28.000	27.000	28.500	26.625	27.708	1.860	6.713
IEL	27.750	25.125	26.875	25.500	27.000	25.625	26.312	2.060	7.829
IOR	21.625	19.750	20.625	19.875	22.125	19.875	20.646	1.700	8.234
IPL	26.250	24.375	25.500	24.625	25.500	24.250	25.083	1.800	7.176
IPW	25.375	24.000	25.000	23.875	25.375	24.500	24.687	2.000	8.101
IWG	46.500	42.750	43.250	42.375	44.375	42.875	43.687	3.340	7.645
KAN	25.125	22.500	23.875	22.125	23.000	22.250	23.146	1.800	7.777
KGE	23.750	20.500	21.625	20.500	21.750	20.500	21.437	1.720	8.023
KLT	35.125	31.875	34.625	32.125	33.875	32.250	33.312	2.560	7.685

Exhibit 3 (continued)

Annualized Dividend Yields for the Indicated Quarter for Utilities Retained in the Sample

Year = 90 Quarter = 1

Ticker Symbol	Price,1st Month of Qtr-High	Price,1st Month of Qtr-Low	Price,2nd Month of Qtr-High	Price,2nd Month of Qtr-Low	Price,3rd Month of Qtr-High	Price,3rd Month of Qtr-Low	Average Price	Dividends Annual Rate	Annualized Dividend Yield
KU	21.000	19.250	20.750	19.625	20.375	19.625	20.104	1.460	7.262
LOU	41.375	37.625	39.750	38.000	40.000	37.875	39.104	2.780	7.109
MAP	22.500	20.500	21.500	20.250	21.750	20.000	21.083	1.680	7.968
MPL	27.375	24.750	26.000	24.500	25.500	25.000	25.521	1.860	7.288
MTP	21.437	19.750	22.000	20.125	21.500	20.375	20.865	1.420	6.806
MWE	22.750	20.375	21.500	20.625	21.500	20.250	21.167	1.640	7.748
NES	28.625	26.375	27.625	26.625	28.125	26.375	27.292	2.040	7.475
NGE	29.250	24.875	26.375	25.000	26.125	24.375	26.000	2.040	7.846
NI	19.250	17.125	18.500	17.500	18.625	17.500	18.083	1.040	5.751
NPT	20.625	18.750	19.750	17.875	18.750	17.750	18.917	1.600	8.458
NSP	40.500	35.250	37.375	35.250	37.250	36.000	36.937	2.220	6.010
NU	22.625	20.500	21.875	20.125	21.375	20.500	21.167	1.760	8.315
NVP	25.750	23.250	23.750	22.250	22.875	21.875	23.292	1.560	6.698
OEC	23.875	21.250	22.250	21.375	22.000	19.125	21.646	1.960	9.055
OGE	39.250	35.375	36.750	35.625	36.750	35.625	36.562	2.480	6.783
ORU	32.000	28.875	30.375	29.125	31.375	29.875	30.271	2.300	7.598
PCG	22.000	20.000	22.750	21.250	22.875	21.000	21.646	1.520	7.022
PE	23.500	20.875	22.000	19.750	20.250	17.375	20.625	2.200	10.667
PEG	29.750	26.375	27.750	26.750	27.250	25.500	27.229	2.080	7.639
PIN	18.250	16.375	16.750	15.625	16.750	16.125	16.646	0.800	4.806
POM	24.000	21.500	22.875	21.250	22.000	21.125	22.125	1.520	6.870
PPL	43.375	40.000	42.125	40.625	42.250	41.000	41.562	2.980	7.170
PPW	23.875	21.625	23.187	22.125	22.750	20.750	22.385	1.380	6.165
PSD	22.500	19.750	20.875	20.000	20.625	20.000	20.625	1.760	8.533
PSR	26.500	24.125	25.750	24.625	24.875	22.750	24.771	2.000	8.074
RGS	21.750	19.875	21.000	20.000	21.000	19.500	20.521	1.560	7.602
SAJ	24.375	22.750	24.875	23.125	26.375	24.625	24.354	1.600	6.570
SCE	40.250	36.625	39.125	36.750	39.500	37.000	38.208	2.560	6.700
SCG	35.875	32.500	34.000	32.500	33.625	31.625	33.354	2.520	7.555
SDO	45.375	42.000	43.375	40.750	43.250	41.625	42.729	2.700	6.319
SIG	31.625	29.750	30.375	29.375	30.375	29.625	30.187	1.900	6.294
SO	29.375	26.125	27.500	26.000	26.750	25.500	26.875	2.140	7.963
SRP	25.500	22.875	23.750	23.000	23.750	23.000	23.646	1.840	7.781
TE	29.500	26.250	29.500	27.625	29.250	28.375	28.417	1.520	5.349
TNP	22.500	20.500	21.000	20.125	20.625	18.875	20.604	1.630	7.911
TXU	35.250	32.625	35.250	33.500	35.000	33.250	34.146	2.960	8.669
UCU	22.375	20.500	21.875	20.250	21.250	20.125	21.062	1.440	6.837
UEP	28.875	26.375	28.000	26.875	27.375	26.500	27.333	2.080	7.610
UIL	34.125	29.375	31.375	28.750	32.375	29.125	30.854	2.320	7.519
UTL	37.500	36.125	36.500	35.000	35.250	34.750	35.854	2.080	5.801
WEC	32.000	28.750	29.625	28.375	29.250	28.250	29.375	1.660	5.651
WPH	24.875	22.000	23.500	22.000	23.500	22.000	22.979	1.740	7.572
WPS	24.500	21.750	22.875	21.500	22.125	21.000	22.292	1.620	7.267
WWP	31.000	29.000	29.750	28.250	29.125	28.000	29.187	2.480	8.497

N = 87

[FR Doc. 90-9139 Filed 4-19-90; 8:45 am]

BILLING CODE 6717-01-C

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 146

[T.D 90-32]

Foreign Trade Zone Status of Unused Parts

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final interpretive rule.

SUMMARY: This document gives notice of Customs final determination to revoke Customs Service Decision (C.S.D.) 83-96, as being contrary to prevailing statutory law and regulation. When an imported component in a foreign trade zone is duty-paid because it was mistakenly shown as being included in a finished article entered therefrom, the mistaken entry may either be corrected in accordance with the statutory provisions established for this purpose, or the component erroneously included in the entry would be treated as an inventory overage in the zone. Either way, the imported component erroneously included in the entry would have to be restored to its previous foreign zone status. It could not remain in the zone and be converted to domestic zone status, as C.S.D. 83-96 permitted.

EFFECTIVE DATE: June 19, 1990.

FOR FURTHER INFORMATION CONTACT: William G. Rosoff, Entry Rulings Branch (202-566-5856).

SUPPLEMENTARY INFORMATION:

Background

Foreign trade zones are secured areas to which foreign and domestic merchandise may generally be brought for certain purposes without being subject to the Customs laws of the U.S. The Foreign Trade Zones Act of 1934, as amended (19 U.S.C. 81a-u) ("the FTZA"), provides for the establishment and regulation of zones, the purpose of which is to attract and promote international trade and commerce. Part 146, Customs Regulations (19 CFR part 146), governs the admission of merchandise into a zone, its removal from the zone, and, among other things, its manipulation, manufacture, destruction or exhibition while in the zone.

Specifically, under section 3 of the Act, as amended, 19 U.S.C. 81c(a), imported and domestic merchandise may be brought into a zone for the purposes therein enumerated without being subject to the Customs laws of the U.S., but when imported merchandise is sent from a zone into Customs territory, it would then be subject to the laws and regulations of the U.S. affecting such merchandise. On this basis, imported merchandise admitted to a zone in so-called "nonprivileged foreign" status would be subject to duty in accordance with its character and condition as entered from the zone for consumption. 19 CFR 146.65(a)(2). In automobile assembly operations conducted in a zone, for example nonprivileged foreign parts, dutiable, roughly, from 4-11% ad valorem depending on the part, would, if assembled into autos, be subject to duty at the rate applicable to autos (2.5% ad valorem), when the latter are entered for consumption.

The second proviso to 19 U.S.C. 81c(a) provides in effect that foreign merchandise which has been imported, duty-paid, may be taken into a zone from the Customs territory, placed in domestic zone status (19 CFR 146.43), and, regardless of whether it was used in manufacturing in the zone, it could subsequently be brought into Customs territory free of duty.

Where an FTZ user erroneously reported a nonprivileged foreign part as included within the dutiable value of an auto manufactured in and entered from a zone for consumption, Ruling 215870, dated June 1, 1983, published as C.S.D. 83-96, 17 Cust. Bull. 932 (1983), held that it was unnecessary for the FTZ user to file an amended entry for the article, and to obtain a refund of the duty paid for the unused part, which would then be returned to nonprivileged foreign status. Instead, the unused part could be converted to domestic status in the zone, having already been duty-paid albeit at the lower rate for autos, with a separate entry being filed for the nonprivileged foreign part used in its place, the dutiable status of that part likewise being regarded the same as the entered article.

The legal basis for the ruling was that there was no perceived danger to the revenue and that Customs had generally been lenient with respect to nonadverse bookkeeping manipulations. However, the revenue could be affected if the unused part were never used in making an auto in the zone. In that situation, the usually higher rate of duty applicable to component parts could be avoided if the part should thereafter be removed from the zone as is.

In T.D. 86-16, 51 FR 5040, effective on May 12, 1986, Customs extensively revised its foreign trade zone regulations, 19 CFR part 146, pursuant to which a new provision, § 146.71, was added thereto. This provision required, in the foregoing circumstances, that the mistaken entry could be corrected in the manner prescribed by statute, with the part erroneously included therein being returned to its former foreign status. In response to a comment asserting that this regulation overruled C.S.D. 83-96 (Ruling 215870), it was stated that "[w]hether or not the provision is contrary to Ruling 215870, the regulations take precedence." 51 FR at 5045. Later, in an unpublished letter ruling, 218799, dated August 21, 1986, Customs reaffirmed C.S.D. 83-96.

In a notice of reconsideration published in the **Federal Register** on May 17, 1989, 54 FR 21223, Customs decided to reexamine this issue, and requested public comment in order to assist in a final determination in this matter.

Discussion of Comments

In all, 16 comments from the public were received in response to the notice of reconsideration, 15 advocating the retention of the ruling, with one comment concluding that C.S.D. 83-96 was already superseded by the current foreign trade zone regulations as revised in 1986.

Comments Favoring Retention

Virtually all those commenting in favor of retention state that the ruling is legal under the Foreign Trade Zones Act; that it furthers the intent of the Act to permit manufacturing activities in a zone under minimum cost conditions; that it provides a practical solution to everyday recordkeeping problems that arise in zone transactions; and that its revocation would add needless complexity and paperwork burdens to zone inventory and accounting systems. A number of these commenters believe that Customs should address whether revocation of the ruling is precluded by the Paperwork Reduction Act, the Regulatory Flexibility Act, Executive Order (E.O.) 12291, and by the General Agreement on Tariffs and Trade (GATT), the latter of which, in pertinent part, makes reference to the need to simplify import documentation requirements.

One commenter, a petroleum company, also says it uses C.S.D. 83-96 to make entries for intermediate products in a zone, which are thereafter intended for further processing/refining

therein before being removed to Customs territory for consumption.

Although these commenters generally contend that C.S.D. 83–96, by its own terms, is only available if its use would not adversely affect the revenue, one such commenter attempts to respond to the Customs' concern in this respect, by suggesting that a new status of zone merchandise be adopted exclusively for purposes of this ruling—that of "privileged domestic-restricted", in order to assure that the actual removal of an imported component to Customs territory for consumption would be permitted only as part of a finished unit having the same duty rate as that which was previously applied to the component inadvertently.

Comment Favoring Revocation

One commenter states that Customs should cancel C.S.D. 83–96 as moot and already superseded by the current foreign trade zone regulations. This commenter asserts that when inventory records which govern potential duty liability get out of phase with Customs entries due to an error in parts movement, the statutory remedy lies under 19 U.S.C. 1520(c)(1) to correct the entry; the remedy under the Customs regulations is to adjust the inventory records in the manner prescribed therein. Both methods achieve the purpose of restoring agreement among movement of merchandise, Customs entries and inventory records. This commenter maintains that the existing Customs foreign trade zone regulations are much simpler and more readily adaptable to high-volume industrial situations.

Customs Analysis

When an imported component in a foreign trade zone is duty-paid because it was mistakenly shown as being included in a finished article entered therefrom, C.S.D. 83–96 permits the component to thereafter be retained in the zone, with its zone status converted from foreign to domestic, a separate entry being filed for the particular component actually used in the finished article.

There is, however, no statutory authority generally, nor is there any authority in the Foreign Trade Zones Act in particular, to support the method used in C.S.D. 83–96 for dealing with an incorrect entry of merchandise from a zone. Congress has set a definite scheme for specifically correcting the erroneous entry. For example, if the entry is not yet liquidated, its correction for clerical error could be effected as provided in 19 U.S.C. 1520(a)(4); if liquidated, its correction could be accomplished as provided in 19 U.S.C. 1501 or 1520(c)(1). The FTZA implicitly adopts this overall statutory scheme by providing generally that "when foreign merchandise is so sent from a zone into customs territory * * * it shall be subject to the laws and regulations of the United States affecting imported merchandise * * *". 19 U.S.C. 81c(a).

Nor is there any authority specifically in the FTZA which would allow imported merchandise falling within the conditionally duty-free purview of the statute to be duty-paid after admission to the zone, and then to remain therein, with its status converted to that of domestic. Rather, under the second proviso to section 3 of the FTZA, as amended, 19 U.S.C. 81c(a), which is the operative provision herein, only merchandise "previously imported on which duty * * * has been paid * * * may be taken into a zone from the customs territory of the United States", and placed in domestic zone status. 19 U.S.C. 81c(a), second proviso; 19 CFR 146.43(a)(2).

Moreover, the second proviso is expressly dependent upon "such regulations respecting * * * the safeguarding of the revenue as the Secretary of the Treasury may deem necessary." Pursuant to this, 146.71 (19 CFR 146.71) was added to the Customs foreign trade zone regulations when these regulations were revised in 1986, and paragraph (d)(2) thereof is precisely on point in this context:

> [a] Component of merchandise which has been entered, but not physically removed from a zone, *shall* be restored to its last zone status, provided the district director [dd] determines that the component was included in the entry through clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law. Such an error, including that in appraisement of any entry or liquidation due to the above circumstances, may be corrected pursuant to section 520(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1)) * * * If the [dd] decides there has been no error, mistake or inadvertence, or that the information was not timely provided, the component will be considered as an overage subject to the provisions of § 146.53(d).

T.D. 86–16, 51 FR 5040, 5061–5062 (emphasis added). The facts formerly dealt with in C.S.C. 83–96, as described, now fall squarely within the scope of § 146.71(d)(2), which has the force and effect of law and which, contrary to C.S.D. 83–96, mandates the legitimate redress available in this situation. The subject entry could be corrected in accordance with the statutory provisions established for this purpose, as already outlined, or the component erroneously included in the entry would be treated as an inventory overage in the zone. 19 CFR 146.53(d). Either way, the important point is that the imported component erroneously included in the entry would have to be restored to its previous foreign zone status. 51 FR at 5046. It could not remain in the zone and be converted to domestic zone status, as C.S.D. 83–96 permitted.

Along these same lines, § 146.71(d)(1) of the revised regulations (19 CFR 146.71(d)(1)), also issued under the second proviso, authorizes district directors to reject or cancel consumption entries from zones when the merchandise is not timely removed from the zone after entry, and merchandise removed from the zone does not enter U.S. commerce and is subsequently readmitted to the zone in domestic status. If the merchandise is so readmitted and the entry cancelled, it will, under this provision, also be restored to its last zone status and a new entry required upon its transfer to Customs territory. See C.S.D. 89–41, 23 Cust. Bull. and Dec., No. 21, 14 (May 24, 1989).

Notably, as observed in the final rulemaking proceedings in T.D. 86–16, the position set forth in § 146.71(d)(1) is consistent with that in § 146.71(d)(2) "in that merchandise which was entered but never removed from [a] zone is treated as constructively transferred back to the zone in its previous zone status." 51 FR at 5046. Resort to such "legislative history" concerning the language of § 146.71(d)(2) is, of course, entirely appropriate, in order to confirm its plain and unambiguous meaning. *See Mast Industries, Inc.* v. *United States*, 5 Fed. Cir. (T) 105, 108–109 (1987). The general purpose of § 146.71, as also averred in T.D. 86–16, is to close an existing loophole, protect the revenue and properly enforce U.S. import laws and regulations. 51 FR at 5046.

Customs also remains of the opinion, after a thorough review of the comments, that the procedure approved in C.S.D. 83–96 "is not noticeably less cumbersome than following the procedure set by the statutes for correcting an entry," 54 FR at 21224, and set by the regulations for handling inventory overages and shortages in a zone (*i.e.*, discrepancies between what the inventory records reveal to be in the zone and what an actual physical count reveals). See, 19 CFR 146.53(d).

In light of this, and especially given the stated purpose of § 146.71, it is fairly evident that there is no conflict presented here with respect to the requirements of GATT, para. 1, 61 Stat. A28, nor with those of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, E.O. 12291, or the Regulatory Flexibility

Act, 5 U.S.C. 603 *et seq.*, the latter three, in any case, having already been expressly addressed in the 1986 revision of the regulations, which included § 146.71. 51 FR at 5046–5047; 5049.

Inventory overages and shortages of nonprivileged foreign parts, dutiable, roughly, from 4–11% ad valorem, could be detected in a zone and conceivably misattributed after the fact to previous entries of automobiles from the zone. Using C.S.D. 83–96, the overages would be converted to domestic (duty-free) status, while the shortages would be separately entered, duty-paid, at the lower rate for autos (2.5% ad valorem); in actuality, however, the overages could have been caused by unrecorded receipts of imported parts into the zone (and would thus properly be admissible in foreign, rather than domestic, zone status), whereas the shortages could have been caused by unrecorded removals of parts from the zone (and would thus properly be subject to duty at the typically higher parts rates, rather than the lower rate for autos). As remarked in the May 17, 1989, notice of reconsideration, using the "offset procedure approved by the ruling could hide these facts." 54 FR at 21224.

Moreover, even where an overage of parts is correctly related to a mistake in a prior entry of autos, once these parts are converted to domestic status under C.S.D. 83–96, having been mistakenly duty-paid at the lower rate for autos, there is nothing in the ruling which would then substantively preclude the subsequent removal of these parts from the zone, as is, for domestic consumption, should they later be needed in the domestic market as repair or replacement parts. In such a case, the usually higher duty rate for auto parts would have been improperly avoided. Nor in this connection, parenthetically, is there any authority in the FTZA which would allow Customs to create a "hybrid" zone status of "privileged domestic-restricted", as one commenter favoring C.S.D. 83–96 suggested be done, in order to close this loophole.

In any event, it is wrong to use C.S.D. 83–96 to justify making entries for intermediate products in a zone, which are thereafter intended to stay in the zone for further processing/refining before being sent into Customs territory for consumption. Such entries simply constitute "sham" transactions prohibited by § 146.71(d)(1). See C.S.D. 89–41, *supra*.

Conclusion

In view of the foregoing, and following careful consideration of the comments received and further review of the matter, Customs has determined to revoke C.S.D. 83–96 as lacking support in the statutory law, and being in direct and irreconcilable conflict with the Customs foreign trade zone regulations as revised in 1986, specifically § 146.71(d)(2) thereof (19 CFR 146.71(d)(2)). The August 21, 1986, unpublished letter ruling, 218799, *supra*, which reaffirmed C.S.D. 83–96, despite the plain, contrary import of § 146.71(d)(2) is, therefore, likewise revoked. Although explicitly invited in the notice of reconsideration, no comments addressed a suitable effective date for this change.

Drafting Information

The principal author of this document was Russell A. Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

Approved: April 16, 1990.

Michael H. Lane,

Acting Commissioner of Customs.

Peter K. Nunez,

Assistant Secretary for Enforcement.

[FR Doc. 90–9196 Filed 4–19–90; 8:45 am]

BILLING CODE 4820–02–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 300

[Docket No. 87N–0358]

Code of Federal Regulations; Authority Citations; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a final rule that published in the **Federal Register** of September 27, 1989 (54 FR 39630), that added an authority citation for 21 CFR part 300. In amendment "92.", the agency inadvertently stated that the authority citation for 21 CFR part 300 was being revised when it should have stated that the authority citation was being added. This document corrects that error.

EFFECTIVE DATE: September 27, 1989.

FOR FURTHER INFORMATION CONTACT: Robin F. Thomas, Office of Regulatory Affairs (HFC–222), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–2994.

PART 300—[AMENDED]

In FR Doc. 89–20633, appearing at page 39630 in the **Federal Register** of Wednesday, September 27, 1989, the following correction is made: On page 39635, in the third column, under amendment "92.", in line 2, "revised" is corrected to read "added".

Dated: April 16, 1990.

Alan L. Hoeting,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 90–9187 Filed 4–19–90; 8:45 am]

BILLING CODE 4160–01–M

21 CFR Part 444

[Docket No. 89N–0448]

Certain Neomycin Sulfate-Polymyxin B Sulfate Containing Ophthalmic Dosage Forms; Revision of Upper Potency Specification

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the antibiotic drug regulations by revising the upper potency specification for certain neomycin sulfate-polymyxin B sulfate ophthalmic dosage forms. This action is being taken to make the upper potency specification for these products consistent with other neomycin-sulfate ophthalmic dosage forms.

DATES: Effective May 21, 1990; written comments, notice of participation, and request for hearing by May 21, 1990; data, information, and analyses to justify a hearing by June 19, 1990.

ADDRESSES: Written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Peter A. Dionne, Center for Drug Evaluation and Research (HFD–520), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4290.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 28, 1989 (54 FR 48915), FDA proposed to amend the antibiotic drug regulations by revising the upper potency specification for certain neomycin sulfate-polymyxin B sulfate ophthalmic dosage forms.

As discussed in the proposal, the individual monographs (regulations) for these products currently specify an upper potency specification for neomycin sulfate and polymyxin B

sulfate of 125 percent of label claim. To bring these products in line with the upper potency specifications of other neomycin sulfate ophthalmic products, the agency has determined that the upper potency specification for neomycin sulfate and polymyxin B sulfate be increased from 125 percent to 130 percent of label claim.

Interested persons were given until January 29, 1990, to submit written comments on this proposal and until December 28, 1989, to submit requests for an informal conference. No comments or requests for an informal conference were received in response to the proposal. Therefore, the agency is amending 21 CFR 444.342h, 444.342i, 444.342j, and 444.342k as set forth below.

Environmental Impact

The agency has determined under 21 CFR 25.24(c)(6) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Economic Impact

The agency has considered the economic impact of this final rule and has determined that it does not require a regulatory flexibility analysis, as defined in the Regulatory Flexibility Act (Pub. L. 96–354). Specifically, the final rule imposes minor amendments to existing technical provisions without imposing more stringent requirements. Accordingly, the agency certifies that this rulemaking, if promulgated, will not have a significant economic impact on a substantial number of small entities.

Submitting Comments and Filing Objections

Any person who will be adversely affected by this final rule may file objections to it and request a hearing. Reasonable grounds for the hearing must be shown. Any person who decides to seek a hearing must file (1) on or before May 21, 1990, a written notice of participation and request for hearing, and (2) on or before June 19, 1990, the data, information, and analyses on which the person relies to justify a hearing, as specified in 21 CFR 314.300. A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for hearing that no genuine and substantial issue of fact precludes the action taken by this order, or if a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who request(s) the hearing, making findings and conclusions and denying a hearing. All submissions must be filed in three copies, identified with the docket number appearing in the heading of this document and filed with the Dockets Management Branch (address above).

The procedures and requirements governing this order, a notice of participation and request for hearing, a submission of data, information, and analyses to justify a hearing, other comments, and grant or denial of a hearing are contained in 21 CFR 314.300.

All submissions under this order, except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 444

Antibiotics.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 444 is amended as follows:

PART 444—OLIGOSACCHARIDE ANTIBIOTIC DRUGS

1. The authority citation for 21 CFR part 444 continues to read as follows:

Authority: Sec. 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357).

2. Section 444.342h is amended in paragraph (a)(1) by revising the second and third sentences to read as follows:

§ 444.342h Neomycin sulfate-polymyxin B sulfate ophthalmic ointment.

(a) * * *

(1) * * * Its neomycin sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of neomycin that it is represented to contain. Its polymyxin B sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of polymyxin B that it is represented to contain. * * *

* * * * *

3. Section 444.342i is amended in paragraph (a)(1)(ii) by revising the third and fourth sentences to read as follows:

§ 444.342i Neomycin sulfate-polymyxin B sulfate ophthalmic solution.

(a) * * *

(1) * * * (ii) * * * Its neomycin sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of neomycin that it is represented to contain. Its polymyxin B sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of polymyxin B that it is represented to contain. * * *

* * * * *

4. Section 444.342j is amended in paragraph (a)(1) by revising the third and fourth sentences to read as follows:

§ 444.342j Neomycin sulfate-polymyxin B sulfate-dexamethasone ophthalmic suspension.

(a) * * *

(1) * * * Its neomycin sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of neomycin that it is represented to contain. Its polymyxin B sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of polymyxin B that it is represented to contain. * * *

* * * * *

5. Section 444.342k is amended in paragraph (a)(1) by revising the second and third sentences to read as follows:

§ 444.342k Neomycin sulfate-polymyxin B sulfate-dexamethasone ophthalmic ointment.

(a) * * *

(1) * * * Its neomycin sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of neomycin that it is represented to contain. Its polymyxin B sulfate content is satisfactory if it is not less than 90 percent and not more than 130 percent of the number of milligrams of polymyxin B that it is represented to contain. * * *

* * * * *

Dated: April 12, 1990.

Sammie R. Young,

Acting Director, Office of Compliance, Center for Drug Evaluation and Research.

[FR Doc. 90–9186 Filed 4–19–90; 8:45 am]

BILLING CODE 4160–01–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

Ohio Regulatory and Abandoned Mined Lands Programs; Revision of Ohio Revised Code

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is announcing the approval of amendments to the Ohio regulatory and abandoned mined lands (AML) programs (hereinafter jointly referred to as the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendments, referred to as Program Amendment Number 40, were initiated by Ohio and are intended to revise six sections of the Ohio Revised Code to be consistent with Amended Substitute House Bill 399 of the 118th Ohio General Assembly. The proposed amendments would revise Ohio's method of calculating average wage rates for contractors performing reclamation work for the State, would restore civil service status to Ohio's regulatory inspection officers, would allow use of forfeited bond and defaulted area funds to pay administrative and design costs, and would prohibit the delay of reclamation while the Ohio Attorney General takes action to recover the State's reclamation expenses.

EFFECTIVE DATE: April 20, 1990.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Mooney, Acting Director, Columbus Field Office, Office of Surface Mining Reclamation and Enforcement, 2242 South Hamilton Road, room 202, Columbus, Ohio 43232; (614) 866–0578.

SUPPLEMENTARY INFORMATION:

I. Background on the Ohio Program
II. Submission of Amendment
III. Director's Findings
IV. Summary and Disposition of Comments
V. Director's Decision
VI. Procedural Determinations

I. Background on the Ohio Program

On August 16, 1982, the Secretary of the Interior conditionally approved the Ohio program. Information on the general background of the Ohio program submission, including the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Ohio program, can be found in the August 10, 1982, **Federal Register** (47 FR 34688 and 47 FR 34718). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 935.11, 935.12, 935.15, 935.16, and 935.25.

II. Submission of Amendment

By letter dated October 2, 1989 (Administrative Record No. OH–1218), Ohio submitted proposed Program Amendment No. 40 to OSM for review pursuant to 30 CFR 732.17(b) and 884.15. This proposed amendment was initiated by Ohio to revise six sections of the Ohio Revised Code (ORC) to be consistent with Amended Substitute House Bill 399 of the 118th Ohio General Assembly. The proposed amendment would revise the Ohio program at ORC sections 1513.02(J); 1513.03; 1513.08(A); 1513.18 (B), (C), (F), and (H); 1513.24; and 1513.37(J).

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15, 732.17, 884.14, and 884.15 are the Director's findings concerning the proposed changes to the Ohio program. Only substantive revisions are discussed. Any revisions not specifically discussed are found to be no less stringent than SMCRA and no less effective than the Federal regulations. These nonsubstantive revisions correct typographical errors and change statutory citations to reflect the adoption of the amendment or simply change language to improve the clarity of the statutes.

(1) Average Wage Rates for Reclamation Contractors

ORC section 1513.02(J): This new paragraph specifies that the Chief of the Ohio Department of Natural Resources, Division of Reclamation (the Chief), shall triennially determine the average wage rates paid by companies performing reclamation for Ohio. The initial determination of the average wage rate will be based on the wages paid by companies performing work for Ohio during the last ten years. Subsequent determinations will be based on wages paid by companies during the preceding three years.

ORC section 1513.18(H): This paragraph is revised by deleting the words "performed in the same or similar locality by private companies doing their own reclamation work" and by substituting the words "as determined by the Chief under § 1513.02 of the Revised Code."

ORC section 1513.24: This additional paragraph provides that the Chief shall require every contractor performing reclamation work under ORC section 1513.24 to pay workers at the greater of their rate of pay or the average wage rate for the same or similar work as determined by the Chief under ORC section 1513.02.

ORC section 1513.37(J): The last sentence in this paragraph is revised by deleting the words "performed in the same or similar location by private companies doing their own reclamation work" and substituting the words "as determined by the Chief under § 1513.02 of the Revised Code."

While there are no direct Federal counterparts to the proposed provisions concerning the determination of wage rates for reclamation contractors, the proposed revisions are not inconsistent with SMCRA at section 405 concerning reclamation programs. The Director notes, however, that this determination does not affect Ohio reclamation projects that involve Federal funds. In those situations, Ohio will be expected to comply with all conditions pursuant to the receipt of the Federal funds.

(2) Civil Service Status for Regulatory Inspectors

ORC 1513.03: This section is revised to delete the statement that Ohio regulatory inspection officers shall serve at the pleasure of the Chief. A new paragraph is also being added to provide that, to be eligible for appointment as inspection officers, appointees shall first pass an examination prepared and administered by the Ohio Department of Administrative Services and that new inspectors shall serve in a provisional status for one year to the satisfaction of the Chief. These provisions shall not apply to persons who were inspection officers on or before April 10, 1972, if the person is a certified employee in the classified service of the State. The Director finds that the application of the State's civil service protection is outside OSM's authority regarding State programs. Therefore, no action will be taken on this amendment.

(3) Administrative and Design Costs for Reclamation of Forfeited and Defaulted Areas

ORC section 1513.08(A): This paragraph is revised to authorize the Chief to expend money from the reclamation supplemental forfeiture account to pay necessary administrative, engineering, and design costs incurred by Ohio in reclaiming forfeited areas. Administrative expenditures need not be made under contract.

ORC section 1513.18 (B) and (C): These paragraphs are being revised to authorize the Chief to expend money

from the defaulted areas fund to pay necessary administrative, engineering, and design costs incurred by Ohio in reclaiming defaulted areas. The amendment also adds that the administrative expenditures need not be made under contract.

While there are no direct Federal counterparts to the proposed provisions, they are not inconsistent with SMCRA at section 509 and the Federal regulations at 30 CFR part 800 concerning bonding. The Federal regulations at 30 CFR 800.50(b) require the regulatory authority to proceed to collect a forfeited bond and to use those funds for reclamation. In the July 19, 1983, final rule approving the Federal regulations at 30 CFR 800.50(b) (48 FR 32957), OSM responded to public comment concerning determination of the amount of bond to be forfeited. Two commentors stated that the regulatory authority should determine the amount of bond that is to be forfeited based on "total" contracting costs—administrative as well as operational. In response, OSM stated that the regulatory authority may determine the amount to be forfeited based on the total cost it will incur in either using State employees to do the reclamation work or contracting with an outside party.

In either case, the State could include its administrative and other costs routinely allowed under cost accounting principles. The Director finds, therefore, that the proposed amendments are consistent with the Federal regulations and can be approved.

(4) Prohibition Against Delaying Reclamation

ORC section 1513.18(F): This paragraph is revised to provide that the Chief shall not postpone the reclamation of forfeited or defaulted areas because of any actions being brought by the Ohio Attorney General under this paragraph to recover the State's reclamation expenses. The amendment also states that prior to completing reclamation, the Chief may collect through the Attorney General any additional amount in excess of the forfeited bond that the Chief believes will be necessary for reclamation of the land.

The Federal regulations at 30 CFR 800.50(d)(1) state that if the forfeited bond amount is insufficient to pay the full cost of reclamation, the operator shall be liable for the remaining costs. Also, the regulatory authority may complete, or authorize completion of, reclamation of the bonded area and may recover from the operator, all costs of reclamation in excess of the amount forfeited. The Director notes that the Federal provision does not authorize delay of reclamation until after additional funds are recovered from an operator, but authorizes completion of reclamation and recovery of the costs from the operator. Delay of reclamation to recover costs would be inconsistent with 30 CFR 800.50(d)(1).

The Director interprets and Ohio has concurred (Administrative Record No. OH–1241) that the proposed rule does not allow the Chief to delay reclamation of forfeited sites until any funds needed in excess of the forfeited amount are actually collected from an operator. The Director finds, therefore, that the proposed rule is no less effective than the Federal regulations.

IV. Summary and Disposition of Comments

The public comment period announced in the October 31, 1989, **Federal Register** (54 FR 45768) ended November 30, 1989. No comments from the public were received.

Agency Comments

Pursuant to sections 503(b) and 405 of SMCRA and the implementing regulations at 30 CFR 732.17(h)(11)(i) and 30 CFR 884.14, comments were solicited from various Federal agencies with an actual or potential interest in the Ohio Program. The U.S. Department of Agriculture responded and encouraged the restoration of civil service status for Ohio Division of Reclamation inspectors and stated that the change would appear to bring more professionalism to the Ohio Department of Natural Resources—Division of Reclamation inspectors.

The U.S. Environmental Protection Agency responded and stated that it had not comment on the proposed amendments. The U.S. Department of Labor responded and stated that the proposed amendments are outside the jurisdiction of the agency.

V. Director's Decision

Based on the above findings, the Director is approving Ohio Program Amendment No. 40. The Director is amending 30 CFR part 935 to implement this decision.

This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to conform their programs with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. Procedural Determinations

National Environmental Policy Act

The Secretary has determined that, pursuant to section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this rulemaking.

Executive Order No. 12291 and the Regulatory Flexibility Act

On July 12, 1984, the Office of Management and Budget (OMB) granted OSM an exemption from sections 3, 4, 7, and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a regulatory impact analysis and regulatory review by OMB.

The Department of the Interior has determined that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not impose any new requirements; rather, it will ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects in 30 CFR Part 935

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Dated: April 11, 1990.

Carl C. Close,

Assistant Director, Eastern Field Operations.

For the reasons set out in the preamble, title 30, chapter VII, subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 935—OHIO

1. The authority citation for part 935 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. In § 935.15, a new paragraph (mm) is added to read as follows:

§ 935.15 Approval of regulatory program amendments.

* * * * *

(mm) The following amendment, as submitted to OSM on October 2, 1989, is approved effective April 20, 1990: Amendment No. 40, which concerns revisions to the Ohio regulatory program and the Ohio abandoned mine lands

program. At Ohio Revised Code (ORC) sections 1513.02(J), 1513.18(H), 1513.24, and 1513.37(J) concerning Average Wage Rates for Reclamation Contractors; ORC 1513.08(A) and 1513.18 (B) and (C), concerning administrative and design costs for reclamation of forfeited areas; and ORC 1513.18(F) concerning prohibition against delaying reclamation.

3. In § 935.25, a new paragraph (d) is added to read as follows:

§ 935.25 Approval of Abandoned Mine Land Reclamation (AMLR) Plan Amendments.

* * * * *

(d) The AMLR Plan Amendment as originally submitted on October 2, 1989, is approved.

[FR Doc. 90-9199 Filed 4-19-90; 8:45 am]

BILLING CODE 4310-05-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-3757-5]

Approval and Promulgation of Implementation Plans; Ohio

AGENCY: United States Environmental Protection Agency (USEPA).

ACTION: Final rulemaking.

SUMMARY: In a November 16, 1988 (53 FR 46095), notice of proposed rulemaking, USEPA proposed to disapprove a site-specific revision to the Ohio State Implementation Plan (SIP) for ozone. This SIP revision would allow compliance to be determined based on monthly averaging of emissions at the Astro Shapes, Incorporated (Astro Shapes) architectural aluminum extrusion coating line (K001), located in Mahoning County, Ohio.

In today's Final Rulemaking, USEPA is disapproving this revision, because it has not been demonstrated (1) that complying coatings are unavailable, (2) that the increase in daily emissions is consistent with the SIP for Youngstown, and (3) that the application of reasonably available control technology (RACT) is infeasible on a less than monthly basis.

EFFECTIVE DATE: This final rulemaking becomes effective on May 21, 1990

ADDRESSES: Copies of the SIP revision are avaliable at the following addresses for review: (It is recommended that you telephone Uylaine E. McMahan, at (312) 886-6031, before visiting the Region V office.)

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch (5AR-26), 230 South Dearborn Street, Chicago, Illinois 60604.

U.S. Environmental Protection Agency, Public Information Reference Unit, 401 M Street SW., Washington, DC 20460.

Ohio Environmental Protection Agency, Office of Air Pollution Control, 1800 WaterMark Drive, Columbus, Ohio 43266-0149.

FOR FURTHER INFORMATION CONTACT: Uylaine E. McMahan, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Region V, Chicago, Illinois 60604, (312) 886-6031.

SUPPLEMENTARY INFORMATION: On May 15, 1986, the Ohio Environmental Protection Agency (OEPA) submitted a revision to its ozone SIP, allowing compliance to be determined based on a monthly averaging of volatile organic compound (VOC) emissions for an architectural aluminum extrusion coating line (K001) at Astro Shapes. This operation is located in Mahoning County, Ohio, which is an urban nonattainment area for the national ambient air quality standard (NAAQS) for ozone.[1]

Existing SIP Requirements

Under the existing federally approved SIP, each architectural aluminum extrusion coating line is subject to the VOC limitation contained in Ohio Administrative Code (OAC) Rule 3745-21-09(U)(1)(iii) (3.5 lbs. of VOC/gal) and is subject to the daily volume-weighted average compliance requirements contained in OAC Rule 3745-21-09(B). USEPA approved these rules as meeting the RACT [2] requirements of the Clean Air Act on October 13, 1980 (45 FR 72122), and June 29, 1982 (47 FR 28097)

Criteria for Review

USEPA's January 20, 1984, policy memorandum entitled "Averaging Times for Compliance with VOC Emission Limits" contains the criteria for evaluating VOC requests for extended averaging, which are as follows

Criterion 1

Extended averaging can be permitted where the source operations are such that daily VOC emissions cannot be determined, or where the application of RACT for each emission point is not economically or technically feasible on a daily basis.

Criterion 2

The area must not lack an approved SIP, and there must not be any measured violations of the ozone standard.

Criterion 3

A demonstration must be made that the use of monthy averaging (greater than 24-hour averaging) will not jeopardize either ambient standards of attainment or the reasonable further progress (RFP) plan for the area. This must be accomplished by showing that the maximum daily increase in emissions associated with monthly averaging is consistent with the approved ozone SIP for the area.

Criterion 4

Averaging times must be as short as practicable and in no case longer than 30 days.

Proposed SIP Revision

In a November 16, 1988 (53 FR 46095), notice of proposed rulemaking, USEPA proposed to disapprove a monthly averaging compliance requirement at the Astro Shapes, architectural aluminum extrusion coating line (K001) ^R located in Mahoning County, Ohio, because it was not demonstrated that (1) complying coatings are unavailable, (2) the increase in daily emissions is consistent with the SIP for Youngstown, and (3) the application of RACT is infeasible on less than a monthly basis. No comments were received during the public comment period.

USEPA has reviewed this variance request and has determined that it does not meet USEPA's criteria for monthly averaging. Therefore, USEPA is disapproving this variance.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 19, 1990. This action may not be challenged later in proceedings to enforce its requirements. (See 307(b)(2).)

Under Executive Order 12291, today's action is not "Major." It has been submitted to the Office of Management and Budget (OMB) for review. Any comments from OMB to USEPA, and any USEPA response, are available for public inspection at the USEPA Region V office listed above.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Ozone, Carbon

[1] In a February 14, 1989 (54 FR 6733) **Federal Register** notice, USEPA proposed to disapprove the OEPA's request to redesignate Mahoning County Ohio to attainment for ozone

[2] A definition of RACT is contained in a December 9, 1976, memorandum from Roger Strelow, former Assistant Administrator for Air and Waste Management. RACT is defined as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility

monoxide, Hydrocarbon, Intergovernmental offices.

Authority: 42 U.S.C. 7401–7642.

Dated: April 12, 1990.

William K. Reilly,

Administrator.

Approval and Promulgation of Plans

Subpart KK—Ohio

Title 40 of the Code of the Federal Regulations, chapter I, part 52, is amended as follows:

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

2. Section 52.1885 is amended by adding paragraph (m) to read as follows:

§ 52.1885 Control strategy: Ozone.

* * * * *

(m) Disapproval—On May 15, 1986, the Ohio Environmental Protection Agency submitted a revision to its ozone State Implementation Plan allowing compliance to be determined based on a monthly averaging for volatile organic compound emissions for an architectural aluminum extrusion coating line (K001), at Astro Shapes, Incorporated. This operation is located in Mahoning County, Ohio, which is an urban nonattainment area for the national ambient air quality standard ozone.

[FR Doc. 90–9222 Filed 4–19–90; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 18

RIN 1018–AA20

Marine Mammals; Native Exemptions

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Interim rule.

SUMMARY: The Fish and Wildlife Service (hereafter the Service) amends the regulations in 50 CFR part 18, implementing the Marine Mammal Protection Act of 1972 (Act), 16 U.S.C. 1361–1407. The Service issues this interim rule to govern the taking of northern sea otters (*Enhydra lutris)* by Alaska Natives for use in creating and selling handicrafts and clothing under the Native exemption section of the Act. It does not affect the take of sea otters by Alaska Natives for subsistence uses. The Service intends to initiate further rulemaking for the purpose of replacing this interim rule after a management plan for the northern sea otter has been developed.

DATE: The amendment to 50 CFR 18.3 becomes effective May 21, 1990.

ADDRESS: Comments and materials concerning this interim rule should be sent to the Regional Director, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, Alaska 99503.

FOR FURTHER INFORMATION CONTACT: Jon R. Nickles, Supervisor, Marine Mammals Management, Fish and Wildlife Enhancement, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, Alaska, 99503, telephone (907) 786–3492.

SUPPLEMENTARY INFORMATION: Recent litigation in the U.S. District Court for the District of Alaska prompted the Service to initiate a thorough administrative review to determine whether a special regulation or definitive interpretation of the handicraft definition as it applies to sea otters was needed. The Service, after reviewing available information, concluded that sea otters were not being taken for handicraft purposes when the Act was passed. Noting that the intent of the Act was to preserve existing Native uses of marine mammals, the Service proposed to amend the regulations in 50 CFR part 18 to indicate clearly that the taking of sea otters for the purposes of creating and selling authentic Native articles is prohibited because authentic Native articles of handicrafts and clothing from sea otters were not commonly produced on or before December 21, 1972. Therefore, no items created from sea otters could be sold under the authority of the Alaskan Native exemption.

The Service interprets the Act, its legislative history, and its existing regulations to prohibit the taking of sea otters by Alaska Natives for use in creating and selling handicrafts and clothing. After review of public testimony and written comments, the Service concludes that no handicraft trade using sea otters by Alaska Natives was in existence prior to passage of the Act that would allow the utilization of sea otters under the handicraft exemption.

This interim rule supersedes Service policy guidelines of the past and resolves the existing controversy over allowed Native uses of the sea otter. The intended effect of this rule is to provide a definitive interpretation of 50 CFR 18.3 as it applies to sea otter. Under the interim rule Alaska Natives may continue to take sea otters for subsistence purposes, but not for the purpose of creating and selling handicrafts and clothing.

The Service will initiate a subsequent rulemaking process for the purpose of replacing this interim rule with a final rule after a management plan for the northern sea otter has been completed. The Service proposes to initiate a management planning process for sea otters in the near future to be completed in 1992. The management plan will be developed by the Service in cooperation with representatives from the State of Alaska, Native groups, environmental organizations and other interest groups with numerous opportunties for public involvement. The primary purpose of the plan will be to provide the Service with broad guidance and long-term direction for the management of sea otters. Specific objectives of the plan will be: To document the policies, goals, objectives and strategies for sea otter management; to review the most recent information on the biology, management and current status of sea otters in Alaska; to identify conservation issues; and to identify management and research needs. When the information is reviewed and the management plan is completed, the Service will, if appropriate, develop regulations to supplement or replace this interim rule. The final outcome of this rule will depend on the recommendations formulated in the management plan.

The proposed rulemaking to amend the regulations in 50 CFR part 18 implementing the Act was published in the **Federal Register** on November 14, 1988 (53 FR 45788). It proposed to prohibit the taking of sea otters by Alaska Natives for use in creating and selling authentic Native articles of handicrafts and clothing under the Native exemption section of the Act, 16 U.S.C. 1371(b). In the February 15, 1989, **Federal Register** (54 FR 6940), the Service extended the comment period on the proposed rule to April 13, 1989. In the May 31, 1989, **Federal Register** (54 FR 23233), the Service gave notice that the comment period was extended until November 30, 1989, to allow time for public meetings to be conducted in selected coastal Alaska locations within the range of the sea otter. In response to a call for meetings outside Alaska, a public meeting was also scheduled in California. The extension of the comment period and the scheduling of the public meetings were in response to requests from Native organizations, individuals, and conservation organizations.

During the extended comment period and after notice in statewide and local newspapers and radio, public meetings were held in Atka, Sitka, Klawock, Unalaska, Cordova, Anchorage, Homer,

Kodiak, Dillingham, and Seldovia, Alaska, and San Francisco, California.

During the comment period, written comments were received from 2,250 sources. Several comments were also received after the comment period had closed. A total of 243 people attended the 11 public meetings. Anchorage had the largest attendance with 55 people, followed by San Francisco with 46 people, and Homer with 29. Attendance at other meetings ranged from 8 to 20 people.

Of the total 2,250 written comments received, there were 1,248 in support of the rule. Approximately 96 percent of these comments were from outside Alaska. A total of 34 conservation organizations submitted comments in support of the proposed rule. Written comments in opposition to the rule numbered 1,002; all but 2 were from individuals or organizations in Alaska. Approximately 700 of these comments were signed petition forms distributed by the Alaska Sea Otter Commission. During the comment period, 22 comments were received from Native organizations and 12 from governmental agencies opposing the proposed rule. These comments are summarized along with responses in the discussion below.

Background

The Act established a moratorium on the taking and importation of marine mammals and marine mammal products (16 U.S.C. 1371(a)). However, the Act exempts from the moratorium the taking of marine mammals, including sea otters, by Alaska Natives under certain conditions (16 U.S.C. 1371(b)):

> Except as provided in section 1379 [of this title], the provisions of this Act shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—
>
> (1) Is for subsistence purposes; or
>
> (2) Is done for purposes of creating and selling authentic native articles of handicrafts and clothing: Provided, That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: And provided further, That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting; and
>
> (3) in each case, is not accomplished in a wasteful manner.

The Service promulgated regulations to implement the Act on December 21, 1972 (37 FR 28173) and substantially amended them on February 25, 1974 (39 FR 7262). 50 CFR 18.3 provides in pertinent part:

> "Authentic native articles of handicrafts and clothing" means items made by an Indian, Aleut, or Eskimo which (a) were commonly produced on or before December 21, 1972, and (b) are composed wholly or in some significant respect of natural materials, and (c) are significantly altered from their natural form and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern techniques at a tannery registered pursuant to § 18.23(c) may be used so long as no large scale mass production industry results.

The legality of the December 21, 1972, "cut-off date" was challenged in court. The Service's regulatory definition of "authentic Native articles of handicraft and clothing" requires that in order to qualify for the Act's take exemption, handicraft articles fashioned from marine mammal parts and products must have been "commonly produced on or before December 21, 1972." The validity of that requirement was established by the decision in *Katelnikoff* v. *U.S. Department of the Interior*, 657 F. Supp. 659 (D. Alaska 1986). The court found the cut-off date specified in the regulation was consistent with the Act's purposes. The court noted that the Act's principal purpose was to establish a moratorium on the taking of marine mammals. The court concluded the Act's purpose was to protect traditional ways rather than to provide means of initiating commercial exploitation of marine mammals by Alaska Natives. The court concluded that:

> Limiting native handicraft items to those commonly produced on or before the effective date of the Act will have a tendency to restrict the taking of marine mammals to the "present levels" referred to in the conference report, 1972 U.S. Code Cong. & Ad. News 4187, 4188, thus complying with the spirit and purpose of the Act as expressed in both the statutory language and later case law. (657 F. Supp. at 660.)

Commercial hunting of sea otters began soon after the 1741 discovery of the Commander Islands by Vitus Bering. There began a period of exploitation which ended 170 years later with the extirpation of the sea otter throughout most of its former range. In 1911 sea otters were included in the Fur Seal Treaty, and all hunting, except by Alaska Natives using aboriginal means, was made illegal (36 Stat. 327). From 1959, when a complete ban on hunting at the time of Alaska Statehood passed, until 1972, when the Act was enacted, sea otters were totally protected from harvest, except on an experimental basis by the State of Alaska.

The Service believes that the exemption for Native handicrafts was neither intended to expand opportunities for Native harvest of marine mammals nor was the exemption intended to cover non-traditional handicraft uses of marine mammals. The House Conference Report to the 1972 Act notes that the handicraft exemption was crafted "* * * to allow for the so-called 'cottage industries' of the Alaskan natives" (H.R. Conf. Rep. No. 1488, 92d Cong., 2d Sess. 23, (1972) U.S. Code Cong. & Ad. News 4187, 4188). In formulating the handicraft exemption, the Service believes Congress intended to support "traditional" and "existing" handicraft enterprises of Alaska Natives, rather than promote commercial expansion of such enterprises. The Native exemption was passed with the understanding that the patterns of Native taking and use of marine mammals would remain as they were in 1972, at the time of the passage of the Act. For the sea otter, this would allow no take by Alaska Natives for the commercialization of handicrafts and clothing.

Evidence concerning Alaska Native use of sea otters appears in several publications. The historic use of sea otters by coastal Alaska Natives before Russian contact is documented in the published literature. During the period of Russian domination, the Native harvest of sea otters was discouraged and restricted. Research into the utilization of sea otters by Alaska Natives reveals little use from the early 1700s through the early 1900s, except for commercialization (selling) of hides. The Service does not dispute that sea otter fur was used for clothing by Alaska Natives who lived in contact with sea otter populations prior to Russian occupation in the 1740s. Nor does the Service doubt the anecdotal evidence presented during the comment period that documents some instances in which otters were used by Alaska Natives in recent years. Traditional Native practice has always been to utilize whatever resources have been available to them. However, the Service concludes that the purpose of the handicraft exemption was to allow Natives to continue those cottage industries that existed at the time the Act was passed and that insufficient use was made of sea otters

by Alaska Natives prior to 1972 to allow for their utilization under the handicraft exemption.

The interim rule would not limit the use of sea otters for subsistence purposes. Alaska Natives may continue to take sea otters in a non-wasteful manner for subsistence and cultural purposes which includes the making of authentic Native articles of handicraft or clothing. Subsistence is defined in 50 CFR 18.3 as follows:

> *Subsistence* means the use by Alaskan Natives of marine mammals taken by Alaskan Natives for food, clothing, shelter, heating, transportation, and other uses necessary to maintain the life of the taker or for those who depend upon the taker to provide them with such subsistence.

By amending the marine mammal regulations in 50 CFR part 18 to clarify their application to the sea otter, the Service complies with congressional intent and supersedes any inconsistent policy guidelines and rulings, thereby resolving any alleged vagueness regarding the allowable uses of this species. The primary objective of this interim rule is to provide clarification until a statewide management plan provides further direction. A cooperative planning effort and the information collected in conjunction with the planning process will be used to develop a long-term program to manage the taking of sea otters. In addition, the Service plans to conduct statewide surveys for sea otters during the next two years to provide accurate population estimates for the planning process. Once the information and recommendations from the management plan have been reviewed, the rule will be reviewed and revised if necessary. It is possible that the proposed changes may affect the present interim rule.

Comments and Responses

The majority of written comments in support of the rule reiterated the position presented in the proposed rule. Specifically, most commenters stated that the proposed regulation fulfilled the mandate of the Act with respect to Alaska sea otters because it would continue to limit the Native take of marine mammals to those practices that were commonly in existence when the Act was passed. Many of the letters expressed support for subsistence use of sea otters by Natives. A few correspondents were against any killing of sea otters for any reason.

Some commenters held that the proposed rule is a strict, but consistent interpretation of the Act. They argued against withdrawing the rule as it would mean a return to a state of confusion and lead to widescale commercial hunts. One group argued that there are areas in Southeast Alaska where sea otters have not made a comeback and to allow unregulated hunting there would be contrary to the Act. Another group stated that the Native exemption was designed to preserve Native culture dependent on the use of marine mammals, not to allow new Native industries to develop.

The main points made by supporters of the proposed rule were: (1) Historically, no traditional practice of using sea otters to create handicraft articles for sale or barter existed which would meet the requirements of the existing regulatory definition and the Act; (2) this is not solely an Alaskan issue, but rather a wildlife issue of national and international significance; (3) the proposed regulation will codify what has always been the rule of law; and (4) prohibiting Alaska Natives from marketing sea otter clothing and handicrafts will have no impact on legitimate subsistence use of sea otters by Alaska Natives.

Opponents of the regulation argued that the use of sea otters to create handicraft items should be allowed today, because in the past, Alaska Natives may have wanted to make such items for barter or sale, but were prevented from doing so. They stated that Alaska Natives are being penalized by laws and ecological conditions that they had no part in bringing about. In addition, some commenters stated that people were reluctant to reveal their knowledge of use of sea otters to a governmental agency that could prosecute them for an illegal activity.

The wording in the proposed rule regarding "Historic Uses of Sea Otters" provoked the most comments from people opposed to the proposed rule. Many people at the public meetings expressed disagreement with the statements "Since 1741 there has been virtually no use of sea otters by Alaska Natives" and "Alaska Natives have apparently not commonly produced and sold handicrafts or clothing from sea otters within living memory." These statements were consistently challenged at every meeting in Alaska and in many written submissions. Many individuals presented historical references to document Native use of sea otters. Most documentation referred to clothes and were records from the time before Russian dominance. Several commenters stated that Natives have always used the resources available to them and that if sea otters had been abundant they were certainly used.

Another major point made by commenters objecting to this rule was the lack of biological justification to support the rule. They pointed out that the sea otter population is adequate to support the limited hunting Congress authorized in the Native exemption. Several people carried the argument further and asserted that limited harvest may be beneficial to the health of the population as a whole. In addition, complaints were made in several communities that expanding sea otter populations were putting pressure on shellfish resources that are also heavily utilized by local residents for subsistence purposes.

Almost all of the organizations opposed to the rule expressed disagreement with the Service's interpretation of the intent of Congress. In general, commenters argued that the Act says "* * * any marine mammal" and not "* * * any marine mammal except sea otters." Several people expressed the belief that the Service had exceeded its authority in proposing this rule.

In summary, most of the comments from people opposing the rule expressed four major points: (1) Congressional language allows for the taking of sea otters by Alaska Natives for making authentic handicrafts and therefore the Service has no authority to propose a ruling that directly contradicts an Act of Congress; (2) Natives did use sea otters prior to 1972 for handicrafts and clothing; (3) sea otter populations are thriving and therefore the proposed ruling has no biological basis; and (4) the Service should abandon the rule and prepare a sea otter management plan designed and implemented with the cooperation of Native Alaskans.

Substantive comments are summarized below along with the Service's responses.

Issue 1: Many commenters disagreed with the Service's interpretation of Congressional intent of the Act.

Response: The Service has thoroughly reviewed the Act and its legislative history and contends that the interim rule is consistent with the Act. The Act was passed to protect marine mammals from commercial exploitation and to that end, the Act provides for a moratorium on the taking of marine mammals. In addition, the Act provides for a limited exception for Alaska Natives for taking marine mammals for subsistence purposes or for purposes of creating and selling authentic Native articles of handicraft and clothing. The Service believes that the exemption for Native handicrafts was neither intended to expand opportunities for Native harvest of marine mammals nor was the exemption intended to cover non-traditional handicraft uses of marine

mammals. The House Conference Report to the 1972 Act notes that the handicraft exemption was crafted "* * * to allow for the so-called 'cottage industries' of the Alaskan natives" (H.R. Conf. Rep. No. 1488, 92d Cong., 2d Sess. 23 (1972), U.S. Code Cong. & Ad. News 4187, 4188). The legislative history of the Act makes clear that the purpose of the Native exemption was the preservation of Native culture and industries dependent on that culture. Congress intended to preserve existing Native uses of marine mammals, characterized as the maintenance of "cottage industries," rather than to promote economic development or the growth of Alaskan arts and crafts industries. The Native exemption was passed with the understanding that the patterns of Native taking and use of marine mammals would remain as they were in 1972, when the Act was passed. For the sea otter, this would allow essentially no take by Alaska Natives for the sale of handicrafts and clothing to non-Natives.

Issue 2: Many commenters disagreed with the Service's preliminary analysis of historical evidence relating to Native use of the sea otter in handicrafts and clothing.

Response: The Service concurs with the many people who felt that the section on "Historic Uses" in the proposed rule was not clear. The Service did not mean to imply that there have been no uses of sea otters since 1741. Following the arrival of Russians in Alaska, Native harvest of sea otters was prohibited. While it is true that during some periods of history Alaska Natives have been prohibited from taking sea otters, the Service agrees that it is entirely likely that Natives outside Russian control continued to use sea otters for subsistence. The United States purchased Alaska from Russia in 1867 and the harvest prohibitions instituted by the Russians were lifted. However, the historical record shows little evidence of Alaska Natives using sea otters for trade, barter, or other economic purposes that involved the creation of handicraft articles or clothing.

Issue 3: Many commenters felt that use of sea otters and production of handicrafts by Natives is essential to preserving and perpetuating Native culture and identity.

Response: The purpose of the Native exemption to the Act was the preservation of Native culture and industries dependent on that culture. The history of Alaska Native culture provides evidence that sea otters were used for cultural and subsistence purposes. The Service recognizes the importance of preserving traditional culture. The subsistence provision of the Act remains unaffected by this interim rule. Section 101(b) of the Act authorizes Natives to take marine mammals for subsistence, and uses of sea otters for this purpose would still be authorized.

Issue 4: Some commenters argued that a contemporary definition of subsistence, which would encompass the use of resources for economic purposes should be recognized. These commenters felt that subsistence should include the ability to trade, barter, and sell for basic life needs and that economic activity is a legitimate aspect of subsistence.

Response: Congress clearly distinguishes between subsistence use and commercial handicraft and clothing use in section 101(b) of the Act. Those seeking a change in the scope of the exemption must petition Congress.

Issue 5: Opponents claimed that Alaska Natives did not have an opportunity to develop a handicraft trade in sea otters because of restrictions and that Alaska Natives are being penalized because of the existence of laws and ecological conditions that they had no part in bringing about.

Response: Following the United States purchase of Alaska in 1867 there were no legal restrictions imposed on the take of otters by Alaska Natives for many years. Between 1868 and 1905, a period during much of which only Natives or their non-Native spouses could legally take sea otters, 107,121 skins were shipped from Alaska (Kenyon, 1969, *The Sea Otter in the Eastern Pacific Ocean*, 136). There is historical evidence that sea otter pelts were sold in unaltered forms; however, that practice is presently prohibited by the Act.

Issue 6: Several commenters argued that the Native exemption pertains to all marine mammals and there is no basis for singling out one species to be treated differently.

Response: No evidence has been supplied to demonstrate that handicraft and clothing articles made from sea otters were commonly produced for commercial sale by Alaska Natives prior to 1972. This is in contrast to the situation with other marine mammals, where handicraft items were produced before 1972 and formed the basis for the "cottage industries" which are perpetuated by the Act. This interim rule is not intended to, and does not, undermine the Native take exemption of the Act. Alaska Natives will continue to have the same subsistence opportunities that they had upon enactment of the Act in 1972. Legitimate uses of sea otters for subsistence purposes and legitimate use of other marine mammals for subsistence, and handicraft and clothing purposes in accordance with the 1972 cut-off date will be allowed.

Issue 7: Some commenters questioned the legality of the 1972 cut-off date which is found in the regulations but not in the Act.

Response: The legality of the 1972 cut-off date was recognized in the decision in *Katelnikoff* v. *U.S. Department of the Interior*, 657 F. Supp. 659 (D. Alaska 1986). In *Katelnikoff*, the United States District Court affirmed the validity of the 1972 "cut-off date," concluding that "limiting native handicraft items to those commonly produced on or before the effective date of the Act will have a tendency to restrict the taking of marine mammals to the 'present levels' referred to in the conference report, 1972 U.S. Code Cong. & Ad. News 4187, 4188, thus complying with the spirit and purpose of the Act as expressed in both the statutory language and later case law." (657 F. Supp. at 660.) The Service's existing regulations, with the "commonly produced" limitation, have been in effect for 17 years and have not been changed or affected by any modifications in the Congressional amendment process.

Issue 8: Many commenters claimed that there is no biological justification for denying a harvest of sea otters.

Response: The interim rule is not related to biological considerations in the management of the sea otter population. Numbers of otters are not relevant in the consideration of the validity of the proposed regulation. The proposed rule was based solely on legal interpretation that the exemption for Native handicrafts and clothing was not intended to expand or create opportunities for Native harvest of marine mammals. Biological considerations will be addressed during development of a sea otter management plan.

Issue 9: Some commenters were concerned about growing numbers of sea otters which created conflicts with shellfish fisheries. Some asserted that Native harvest would be useful in controlling sea otter population growth.

Response: The interim rule is promulgated to clarify the Service's position on the use of sea otters for the creation and sale of authentic Native handicraft items. Conflicts regarding the sea otters and other resources will be addressed through the management planning process.

Issue 10: Commenters on both sides of the issue emphasized the need to formulate a comprehensive management plan for sea otters.

Response: The Service is working with the Alaska Sea Otter Commission and the State of Alaska in developing a Memorandum of Agreement regarding sea otter management and exchange of information. In addition, the Service will begin a major planning effort this spring to produce a statewide Sea Otter Management Plan. As part of the planning effort, the Service will consult with the Alaska Sea Otter Commission, the Alaska Department of Fish and Game, and other interested parties.

Issue 11: A few commenters called for a total ban on all hunting of marine mammals.

Response: Congress has made special provisions in the Act for Alaska Natives to continue taking marine mammals for their way of life. The Native exemption section provides in relevant part that any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean may take any marine mammal without a permit, if such taking is: (1) For subsistence purposes, or (2) for purposes of creating and selling authentic native articles of handicrafts and clothing, and (3) in each case, is not accomplished in a wasteful manner.

Issue 12: Some commenters thought that Alaskan sea otters were endangered.

Response: The Alaska sea otter population has recovered from near extinction in 1911 to healthy population levels throughout most of its historical range. Today the survival of the sea otter as a species is no longer in question and the Alaska population is neither endangered nor threatened. The confusion on this point possibly arose because the California sea otter population is designated as "threatened" under the Endangered Species Act due to its small population size, limited range, and possible environmental threats.

Issue 13: Many commenters expressed concern over the loss of sea otters associated with the 1989 Exxon Valdez oil spill in Prince William Sound and thought otter numbers were now too low to allow any harvest.

Response: Under the Act, if the Secretary of the Interior determines any species or stock of marine mammals to be depleted, the Secretary may prescribe regulations pursuant to Section 103 of the Act governing the take of marine mammals. The extent of the damage done to the sea otter population by the Exxon Valdez oil spill is still being assessed. However, the Prince William Sound sea otter population was estimated at the highest to be about 10,000 animals and there are an estimated 150,000–200,000 sea otters in the State of Alaska. The portion of the Alaskan sea otter population in the path of the spill was a small fraction of the Statewide population. Therefore most of the subpopulations or stocks within the Alaska population are not in danger of being declared depleted.

Issue 14: Various commenters thought that pillows, fur flowers, wind chimes and teddy bears were not representative of authentic Native handicrafts.

Response: The Service's interpretation of the Native exemption provision of the Act holds that the above items are not considered authentic Native handicrafts made prior to passage of the Act in 1972. The validity of the Service's position was challenged in a lawsuit filed in 1985 in the U.S. District Court for the District of Alaska (*Katelnikoff* v. *U.S. Department of the Interior*). In July 1986 the Court upheld the Service's regulatory definition of "authentic native articles of handicrafts and clothing."

Issue 15: A few commenters expressed concern that the Service's position freezes Native handicrafts at pre-1972 status and does not permit them to evolve or grow. One commenter said that the Service's interpretation stifles Native creativity and cuts off natural cultural evolution.

Response: The Act represents a compromise situation regarding the many viewpoints on uses of marine mammals. The U.S. House of Representatives version of the Act did not allow for the taking of marine mammals for handicraft purposes. Alaska Representative Nick Begich proposed an amendment for Native exemption to the moratorium under certain conditions. He stated that the intent of the amendment was to support traditional and existing arts and crafts enterprises rather than promote commercial exploitation (118 Cong. Rec. 7703, March 9, 1972). However, the proposed Begich amendment did not pass. The House bill exempted Alaska Natives from the moratorium to the extent they take an animal for subsistence purposes, or not wastefully and not for direct or indirect sale. The Senate amendment extended the exemption to allow for the so-called "cottage industries" of the Alaskan Natives. The Native exemptions were passed with the understanding that the patterns of Native taking and use of marine mammals would remain as they were in 1972, at the time of the passage of the Act. For the sea otter this would allow essentially no take by Alaska Natives for the commercialization of handicrafts and clothing.

Issue 16: One commenter suggested that the Service relinquish its authority for sea otters and return management to the State of Alaska.

Response: The Act withdrew marine mammal management authority from the States and charged Federal agencies with conservation and management of marine mammals. Section 109 of the Act contains provisions that allow for the transfer of management authority to coastal States. However, as of the date of this rule, no application from the State of Alaska, for the transfer of marine mammal management authority, is pending.

Issue 17: Several commenters pointed out that this is not an Alaskan or Native issue only but is, rather, a national issue regarding a wildlife resource that concerns many Americans.

Response: The Service agrees that this issue is of national interest. The geographic range of the commenters attests to the interest throughout the country. However, those most affected by the rule are Alaska Natives. For this reason the Service conducted public meetings in 10 Alaskan coastal communities named earlier in this document to ensure that those most affected by the rule had an opportunity to present information and comments.

Paperwork Reduction Act

There are no information collection requirements contained in this document that require Office of Management and Budget clearance under 44 U.S.C. 3501.

Economic Effects

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and certifies that this interim rule will not have a significant effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*]. Since there has been no lawful, commercial use of sea otters by Alaska Natives for more than 200 years, there will be no economic impacts on the public, individual industries or Federal, state, or local governments. The only effect of this rule will be to eliminate the confusion and controversy which have resulted from the misinterpretation of congressional intent, previous regulatory language, and policy guidelines regarding the allowable Native uses of the sea otter.

Environmental Considerations

The Service has determined that an environmental assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared for this action. Since the interim rule reflects the statutory

language and intent of Congress in the Act, this document is considered an amendment to an approved action having no potential for causing substantial environmental impact, and thus qualifies as a categorical exclusion from National Environmental Policy Act requirements under 516 DM 6, Appendix 1, Section 1.4(A)(1).

Lists of Subjects in 50 CFR Part 18

Administrative practice and procedure, Alaska, Imports, Marine mammals, Transportation.

For the reasons set forth in the preamble, part 18, subchapter B of chapter 1, title 50 of the Code of Federal Regulations is amended as set forth below:

PART 18—MARINE MAMMALS

1. The authority citation for 50 CFR Part 18 is revised to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

§ 18.3 [Amended]

2. Section 18.3 is amended by adding the following sentence to the end of the definition of "Authentic native articles of handicrafts and clothing": "Provided that, it has been determined that no items created in whole or in part from sea otter meet part (a) of this definition and therefore no such items may be sold."

Dated: March 27, 1990.

Richard N. Smith,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 90-9195 Filed 4-19-90; 8:45 am]

BILLING CODE 4310-55-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 672

[Docket No. 91050-0019]

Groundfish of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of closure; request for comments.

SUMMARY: The Director, Alaska Region, NMFS (Regional Director), has determined that the portion of the total allowable catch (TAC) of sablefish allocated to hook-and-line gear in the West Yakutat District of the Eastern Regulatory Area of the Gulf of Alaska will be taken before the end of the year. The Secretary of Commerce (Secretary) is prohibiting further directed fishing for sablefish by longline vessels fishing in this area from 12:00 noon, Alaska Daylight Time (ADT), on April 16, 1990, through December 31, 1990.

DATES: This notice is effective from 12:00 noon, ADT, on April 16, until midnight, Alaska Standard Time, December 31, 1990. Comments will be accepted through May 1, 1990.

ADDRESSES: Comments should be addressed to Steven Pennoyer, Director, Alaska Region (Regional Director), National Marine Fisheries Service, P.O. Box 21668, Juneau, Alaska 99802-1668.

FOR FURTHER INFORMATION CONTACT: Janet E. Smoker, Fishery Management Biologist, 907-586-7230.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) governs the groundfish fishery in the exclusive economic zone in the Gulf of Alaska under the Magnuson Fishery Conservation and Management Act. Regulations implementing the FMP are at 50 CFR part 672. Section 672.20(a) of the regulations establishes an optimum yield (OY) range of 116,000-800,000 metric tons (mt) for all groundfish species in the Gulf of Alaska. TACs for target species and species groups are specified annually within the OY range and apportioned among the regulatory areas and districts.

The 1990 TAC specified for sablefish in the West Yakutat District is 4,550 mt (January 31, 1990; 55 FR 3223); the portion of the TAC allocated to hook-and-line gear is 4,320 mt. Under § 672.24(b)(3)(i), if the share of the sablefish TAC assigned to any type of gear for any area or district will be taken before the end of the year, further directed fishing for sablefish will be prohibited in order to provide adequate bycatch amounts to ensure continued fishing activity by that gear group.

During the remainder of the fishing year, hook-and-line fisheries in the West Yakutat District are expected to require 100 mt of sablefish for bycatch in other hook-and-line fisheries. Therefore, the Regional Director plans to close the directed fishery when the directed fishing allowance of 4,220 mt have been taken. The directed hook-and-line fishery for sablefish started April 1, 1990. The Regional Director reports that vessels using hook-and-line gear have landed 1,993 mt of sablefish through April 10 in the West Yakutat District. The longline fleet in this area has recent average daily sablefish landings of 419 mt per day. At this rate, the balance of the 4,220 mt will be harvested by 12:00 noon, ADT, April 16, 1990.

Therefore, pursuant to § 672.24(b)(3)(i), the Secretary is prohibiting further directed fishing for sablefish caught with hook-and-line gear in the West Yakutat District effective 12:00 noon, ADT, April 16, 1990. After the closure, in accordance with § 672.20(g)(2), amounts of sablefish on board a hook-and-line vessel in the West Yakutat District at any time must be less than 4 percent of the total amount of fish and fish products retained on board the vessel, as calculated from round weight equivalents.

Allocation of the sablefish resource between hook-and-line and trawl gear in the West Yakutat District area, and the continued health of all components of the sablefish fishery will be jeopardized unless this notice takes effect promptly. NOAA finds for good cause that prior opportunity for public comment on this notice is contrary to the public interest and its effective date should not be delayed.

Public comments on the necessity for this action are invited for a period of 15 days after the effective date of this notice. Public comments on this notice of closure may be submitted to the Regional Director at the address above until May 1.

Classification

This action is taken under §§ 672.20 and 672.24, and is in compliance with Executive Order 12291.

List of Subjects in 50 CFR Part 672

Fisheries, Reporting and recordkeeping requirements.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 16, 1990.

Richard H. Schaefer,

Director, Office of Fisheries Conservation and Management.

[FR Doc. 90-9137 Filed 4-16-90; 4:30 am]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 55, No. 77
Friday, April 20, 1990

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 936

Oklahoma Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: OSM is announcing receipt of a proposed amendment to the Oklahoma permanent regulatory program (hereinafter, the "Oklahoma program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment pertains to an exemption for the extraction of coal incidental to the extraction of other minerals. The amendment is intended to revise the State program to be consistent with the corresponding Federal standards.

This notice sets forth the times and locations that the Oklahoma program and proposed amendment to that program are available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendment, and the procedures that will be followed regarding the public hearing, if one is requested.

DATES: Written comments must be received by 4 p.m., c.d.t. May 21, 1990. If requested, a public hearing on the proposed amendment will be held on May 15, 1990. Requests to present oral testimony at the hearing must be received by 4 p.m., c.d.t. on May 7, 1990.

ADDRESSES: Written comments should be mailed or hand delivered to James H. Moncrief at the address listed below.

Copies of the Oklahoma program, the proposed amendment, and all written comments received in response to this notice will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. Each requester may receive one free copy of the proposed amendment by contacting OSM's Tulsa Field Office.

James H. Moncrief, Director, Tulsa Field Office, Office of Surface Mining Reclamation and Enforcement, 5100 East Skelly Drive, Suite 550, Tulsa, OK 74135, Telephone: (918) 581–6430.

Oklahoma Department of Mines, 4040 N. Lincoln, Oklahoma City, OK 74103, Telephone: (918) 521–3859.

FOR FURTHER INFORMATION CONTACT: James H. Moncrief, Director, Tulsa Field Office, at telephone number (918) 581–6430.

SUPPLEMENTARY INFORMATION:

I. Background on the Oklahoma Program

On January 19, 1981 the Secretary of the Interior conditionally approved the Oklahoma program. General background information on the Oklahoma program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Oklahoma program, can be found in the copies of the **Federal Register** January 19, 1981 (46 FR 4910), April 2, 1982 (47 FR 14152), May 4, 1983 [48 FR 20050], and August 28, 1984 (49 FR 34000). Subsequent actions concerning the Oklahoma program and program amendments can be found at 30 CFR 936.15, 936.16, and 936.30.

II. Proposed Amendment

By letter dated March 30, 1990, (administrative record No. OK–914), Oklahoma submitted a proposed amendment to its program under SMCRA. Oklahoma submitted the proposed amendment in response to (1) a February 7, 1990, letter (administrative record No. OK–909 that OSM sent in accordance with 30 CFR 732.17(d) and (2) a required program amendment at 30 CFR 936.16(a). The regulations that Oklahoma proposes to amend concern an exemption for operations where the extraction of coal is incidental to the extraction of other minerals. Specifically, Oklahoma proposes to amend the Oklahoma Permanent Regulatory Program Regulations (OPRPR) at the following sections: 700.5, concerning the definition of surface coal mining operations as it applies to operations were the extraction of coal is incidental to the extraction of other minerals; and 700.11(b)(4), concerning the applicability of OPRPR to operations where the extraction of coal is incidental to the extraction of other minerals. Oklahoma also proposes to add a new part 702 entitled "Exemption for Coal Extraction Incidental to the Extraction of Other Minerals."

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSM is seeking comments on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the Oklahoma program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "DATES" or at locations other than the Tulsa Field Office will not necessarily be considered in the final rulemaking or included in the administrative record.

Public Hearing

Persons wishing to testify at the public hearing should contact the person listed under "FOR FURTHER INFORMATION CONTACT" by 4 p.m., c.d.t. on May 7, 1990. The location and time of the hearing will be arranged with those persons requesting the hearing. If no one requests an opportunity to testify at the public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSM officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to testify have been heard. Persons in the audience who have not been scheduled to testify, and who wish to do so, will be heard following those who have been scheduled. The hearing will end after all persons scheduled to testify and persons present in the audience who wish to testify have been heard.

Public Meeting

If only one person requests an opportunity to testify at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSM representatives to discuss the proposed amendment may request a meeting by contacting the person listed under "FOR FURTHER INFORMATION CONTACT." All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under "ADDRESSES." A written summary of each meeting will be made a part of the administrative record.

List of Subjects in 30 CFR Part 936

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Dated: April 11, 1990.

Raymond L. Lowrie,

Assistant Director, Western Field Operations.

[FR Doc. 90-9200 Filed 4-19-90; 8:45 am]

BILLING CODE 4310-05-M

NATIONAL SCIENCE FOUNDATION

45 CFR Part 670

Designation of Pollutants; Permitting Requirements

AGENCY: National Science Foundation.

ACTION: Advance Notice of Proposed Rulemaking; Public Hearing.

SUMMARY: This notice announces a public hearing to examine several issues concerning the designation and regulation of pollutants in Antarctica. The National Science Foundation ("NSF") proposes to issue regulations pursuant to the Antarctic Conservation Act of 1978, 16 U.S.C. 2401 et al., which will define pollutants and regulate the introduction into Antarctica of any pollutant that may create hazards to human health, harm living resources of marine life, damage amenities, or interfere with other legitimate uses of Antarctica. Once an appropriate definition for pollutants is established, no United States citizen, including officials of the Federal government, may discharge, release, or abandon designated pollutants except pursuant to an NSF permit. Development of an effective pollution permit program under the Antarctic Conservation Act ("Act") will enable NSF to synchronize United States Antarctic Program operations with sound environmental practices, to prevent potential environmental harm by U.S. citizens, and to fulfill its statutory obligations under the Act.

Issues to be discussed at the hearing include (1) tentative definitions of pollutants, (2) prohibited acts under an NSF permitting program, and (3) any other options for addressing these environmental issues in the United States Antarctic Program.

DATES: The public hearing will be held on Friday, May 18, 1990, at 9:30 a.m.

ADDRESSES: Written requests to participate in the public hearing must be mailed to the Office of General Counsel, National Science Foundation, 1800 G Street, NW., Washington, DC 20550, or hand delivered to the same address between the hours of 9 a.m. and 5 p.m. Monday through Friday. Requests must include the information specified below and be received no later than 5 p.m. on Tuesday, May 15, 1990.

Hearing Location: National Science Foundation, Room 540, 1800 G St., NW., Washington, DC 20550.

FOR FURTHER INFORMATION CONTACT: Robert M. Andersen, Deputy General Counsel; Lawrence Rudolph, Assistant General Counsel, Office of the General Counsel, (202) 357-9435; or Gary Staffo, Safety, Environment, and Health Officer, Division of Polar Programs, (202) 357-7766, National Science Foundation, at the above address.

SUPPLEMENTARY INFORMATION: The Antarctic Conservation Act of 1978 ("Act") requires the National Science Foundation ("NSF") to "designate as a pollutant any substance which the Director [of NSF] finds liable, if the substance is introduced into Antarctica, to create hazards to human health, to harm living resources of marine life, to damage amenities, or to interfere with other legitimate uses of Antarctica." 16 U.S.C. 2405(b)(6). In addition to the designation of pollutants, the Act also requires NSF to "specify those actions which must, and those actions which must not, be taken in order to prevent or control the discharge or other disposal of pollutants, from any source within Antarctica." 16 U.S.C. 2405(b)(7).

The Office of the General Counsel, together with the Division of Polar Programs, is holding this public hearing to consider specific issues concerning the designation and regulation of pollutants in Antarctica. A task force within NSF has completed some preliminary work on the issues inherent in defining pollutants and regulating pollutant discharges. These actions were taken pursuant to the Director's instructions to implement the recommendations contained in the December 1989 report entitled "A National Science Foundation Strategy for Compliance with Environmental Law in Antarctica."

Preliminary discussion within NSF's task force focussed on the following possible approach: (1) NSF should ban substances such as nuclear and hazardous wastes from entering Antarctica; (2) substances such as pesticides may be imported only with a special permit; (3) potentially hazardous or toxic substances may be imported and used in Antarctica, but the resulting waste product cannot be left in Antarctica; (4) certain substances, that ultimately result in "conventional" pollutants (non-hazardous, non-toxic waste), may be imported, used, and disposed of in Antarctica, but only in permitted amounts and in accordance with required disposal conditions; and (5) certain substances will be exempt from NSF permit requirements, particularly if they are subject to other permits or regulated conditions.

This approach would result in the following prohibitions:

(1) It is unlawful for any United States citizen to discharge, release, or otherwise dispose of, any designated pollutant within Antarctica, unless authorized by these regulations or a permit issued by NSF under the Act and these regulations.

(2) It is unlawful for any United States citizen to abandon, discharge, release, or otherwise dispose of any hazardous waste in Antarctica.

(3) It is unlawful for any United States citizen to transport hazardous waste to Antarctica with the intent to abandon, discharge, release, or otherwise dispose of the hazardous waste in Antarctica.

(4) It is unlawful for any United States citizen to treat or store hazardous waste within Antarctica without an NSF permit.

The definition of pollutants prohibited discharge levels, and hazardous waste will also be critical to these regulatory efforts. In addition to the approach outlined above, we set forth the following tentative definitions for discussion at the public hearing:

Pollutant—any substance that has potential to create hazards to human health, to harm living resources or marine life, to damage amenities, or unreasonably interfere with other legitimate uses of Antarctica if the substance is introduced or disposed of in the Antarctic environment.

Designated Pollutant

(a) Any pollutant which the Director has determined, by the weight of the available scientific and other evidence, is liable to create one of the harmful effects listed in section 2405(b)(6) of the Act and which has been placed on the

NSF master list of designated pollutants; or

(b) Any element, substance, compound, or mixture including disease causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through the food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

Prohibited Discharge Levels—discharge, release, or disposal levels, or amounts, of designated pollutants that NSF has determined may not be exceeded even with a permit.

Hazardous Waste—any designated pollutant which is no longer fit for its intended uses and poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed.

Finally, we believe that a federal inter-agency group, including members from organizations outside government, should be created to advise and assist the NSF team of scientists and lawyers who must draft these regulations. Nominations of qualified individuals from government agencies and other public or private organizations to serve on this task force are welcome. All nominations should be submitted in a nomination letter sent to NSF's Deputy General Counsel, who is chairing the NSF team and will also head to inter-agency advisory group, no later than May 18, 1990.

Persons wishing to participate in the hearing should send a separate written request to the Office of the General Counsel, National Science Foundation, 1800 G Street NW., Washington, DC 20550, to be received no later than close of business Tuesday, May 15, 1990. The request to participate must include the following information: (1) The name of the witness, (2) the name of the agency, organization or association the witness is representing, and (3) a brief summary of the witness' remarks. Depending on the number of requests received, participants may be limited to a ten-minute oral presentation. Written submissions will be welcome in lieu of or in addition to oral comments. NSF will also accept subsequent written submissions, both new and supplemental, up to 30 days after the public hearing. Additional written comments will, of course, be solicited in response to any proposed regulations issued by the Foundation in the future.

By the National Science Foundation.
April 16, 1990.

Robert M. Andersen,

Deputy General Counsel.

[FR Doc. 90-9235 Filed 4-19-90; 8:45 am]
BILLING CODE 7555-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 642

[Docket No. 900495-0095]

RIN 0648-AC77

Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Proposed rule.

SUMMARY: NOAA issues this proposed rule to implement Amendment 5 to the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). This proposed rule would (1) extend the management area for Atlantic migratory groups of king and Spanish mackerel through the Mid-Atlantic Fishery Management Council's area of authority, that is, the exclusive economic zone (EEZ) off the States of New York through Virginia; (2) revise the fishing year for Gulf migratory group Spanish mackerel; (3) revise the definition of "overfishing," add a separate definition of "overfished," and add a definition of "conflict;" (4) make the South Atlantic Fishery Management Council responsible for pre-season adjustments of total allowable catch (TAC) and bag limits for the Atlantic migratory groups of king and Spanish mackerel and the Gulf Fishery Management Council responsible for such adjustments for the Gulf migratory groups of king and Spanish mackerel; (5) specify that the earned income requirement to qualify for an annual permit for a vessel owned by a corporation must be met by a shareholder or officer of the corporation or the vessel operator; (6) redefine recreational bag limits as daily bag limits; (7) prohibit the use of gear other than hook-and-line and run-around gillnets to fish in the EEZ for king mackerel from the Gulf migratory group; (8) impose a daily bag limit of two cobia per person; (9) establish a minimum size limit of 12 inches (30.5 centimeters) fork length or 14 inches (35.6 centimeters) total length for king mackerel and require that king mackerel be landed with head and fins intact; (10) remove the provision allowing sale of mackerel taken under a bag limit; (11) charge a fee to cover the administrative costs of issuing permits; (12) clarify the requirement that fish, subject to a minimum size limit, must be landed with head and fins intact; and (13) make minor corrections and clarifications to the regulations and conform them to current usage. The intended effects are to continue rebuilding the king and Spanish mackerel resources, provide additional protection for cobia and other coastal migratory pelagic fish, provide equitable access to the available king and Spanish mackerel, improve the management regime, and correct and clarify the regulations.

DATES: Written comments must be received on or before June 1, 1990.

ADDRESSES: Requests for copies of the FMP, which includes a regulatory impact review/environmental assessment (RIR/EA) should be sent to the Gulf of Mexico Fishery Management Council, 5401 West Kennedy Boulevard, Suite 881, Tampa, FL 33609 or the South Atlantic Fishery Management Council, Southpark Building, One Southpark Circle, Suite 306, Charleston, SC 29407-4699.

Comments on the proposed rule should be sent to Mark F. Godcharles, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, FL 33702.

FOR FURTHER INFORMATION CONTACT: Mark F. Godcharles, 813-893-3722.

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic fish (king mackerel, Spanish mackerel, cero, cobia, little tunny, dolphin, and, in the Gulf of Mexico only, bluefish) is managed under the FMP, prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils), and its implementing regulations at 50 CFR part 642, under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act).

Amendment 5 is a major revision of the FMP. As amended, the FMP would address eleven problems in the fishery as follows:

(1) Gulf and Atlantic group Spanish mackerel and Gulf group king mackerel are below the population levels necessary to produce maximum sustainable yield (MSY), and spawning stocks have been reduced to the extent that recruitment has been affected. The harvest levels of Atlantic group king mackerel are close to their upper limit of

acceptable biological catch. Uncontrolled fishing would further reduce biomass.

(2) Insufficient data:

(a) Recreational catch statistics are not available in a sufficiently timely manner to track catches for quota purposes.

(b) Additional biological data, statistical data on both the recreational and commercial fisheries, and economic information that assesses the impact of regulations and allocations are needed.

(3) Intense conflicts and competition exist between recreational and commercial users of the mackerel stocks and among commercial users employing different gears.

(4) The existence of separate state and Federal jurisdictions and lack of coordination between these two entities makes biological management difficult since, in some instances, the resource may be fished beyond the allocation in state waters.

(5) The condition of the cobia stock is not known and increased landings over the last ten years have prompted concern about overfishing.

(6) Lack of information on multiple stocks or migratory groups of king mackerel which may mix seasonally confounds and complicates management.

(7) Large catches of mackerel over a short period cause allocations/quotas and total allowable catch (TAC) to be exceeded before closures can be implemented. Therefore, some users have obtained a share in excess of their allocation.

(8) Closures of fisheries and reversion of bag limits to zero due to the filling of allocations/quotas have deprived fishermen, in some geographic areas, of access to a fishery.

(9) Current allocations of Atlantic migratory group Spanish mackerel do not reflect the distribution (i.e., recreational/commercial ratios) of catches during the early to mid-1970s, which was prior to the development of the deep-water run-around gillnet fishery and when the resource was not overfished.

(10) Fish caught and sold under the bag limit contribute to the filling of both the recreational and commercial quotas.

(11) Part-time commercial fishermen compete with full-time commercial fishermen for the available quota.

Problems (3), (4), and (9) remain unchanged from the FMP, as previously amended. The other problems are either revised or added by Amendment 5.

The FMP would contain the following management objectives:

(1) The primary objective of the FMP is to stabilize yield at MSY, allow recovery of overfished populations, and maintain population levels sufficient to ensure adequate recruitment.

(2) To provide a flexible management system for the resource which minimizes regulatory delay while retaining substantial Council and public input into management decisions and which can rapidly adapt to changes in resource abundance, new scientific information, and changes in fishing patterns among user groups or by area.

(3) To provide necessary information for effective management and establish a mandatory reporting system for monitoring catch.

(4) To minimize gear and user group conflicts.

(5) To distribute the TAC of Atlantic migratory group Spanish mackerel between recreational and commercial user groups based on the catches that occurred during the early to mid 1970s, which is prior to the development of the deep-water run-around gillnet fishery and when the resource was not overfished.

(6) To provide appropriate management to address specific migratory groups of king mackerel.

Objective (5) was approved in Amendment 4 to the FMP and objective (6) would be added by Amendment 5.

To address the problems in the fishery and in pursuit of the objectives of the FMP, as it is proposed to be amended by Amendment 5, the following changes would be made in the regulations implementing the FMP.

The regulations applicable to Atlantic migratory groups of king and Spanish mackerels would apply within the area of authority of the Mid-Atlantic Fishery Management Council, that is, off the states from New York through Virginia. This action would provide management for the mackerel stocks that have recently extended their range to the mid-Atlantic area. Extension of management would comply with the requirement of the Magnuson Act that "* * * an individual stock of fish shall be managed as a unit throughout its range * * *". This extension of the management unit is limited to king and Spanish mackerel because data do not indicate that catches of other coastal migratory pelagic fish have significantly increased north of their current management unit.

The fishing year for Gulf group Spanish mackerel would be revised from July 1 through June 30 to April 1 through March 31. In 1989, the commercial allocation for Gulf group Spanish mackerel was reached on April 6, prior to the typical high catch-rate season in the northern Gulf of Mexico. As a result, the net boats were virtually shut out of the fishery. Change in the fishing year would distribute the commercial catch geographically into the northern Gulf of Mexico.

In order to comply with the new guidelines for FMPs established by 50 CFR part 602, the definition of "overfished" or "overfishing" would be revised. The revision provides that the determination of whether a stock is biologically overfished will be based on a target percentage level of spawning stock biomass per recruit to be recommended by the stock assessment panel and the Scientific and Statistical Committees, adopted by the Councils, and approved by the Regional Director under the stock assessment procedures of § 642.27. The target level may not be lower than 20 percent. In addition, "overfishing" would be separately defined for either a stock that is overfished or a stock that is not overfished.

A definition of "conflict" would be added. The FMP provides that, in the event of user or gear conflicts, the Secretary, after consultation with the Councils, may take specified action to separate the users to resolve the conflict. Conflict had not, heretofore, been defined. This definition would provide the intent of the Councils as to when measures to separate users may be employed.

The procedures for making annual preseason adjustments to MSYs, TACs, allocations, quotas, bag limits, or permits would specify that the South Atlantic Council is responsible for adjustments on Atlantic migratory groups of mackerels and the Gulf Council is responsible for adjustments on Gulf migratory groups. The proposed separation of responsibility would facilitate management procedures and would permit each Council's committees to concentrate on specific migratory groups.

The qualifications to obtain an annual vessel permit would be changed to specify that the ten-percent earned income from fishing requirement be met by a shareholder or officer (or the operator) when the vessel is owned by a corporation. This change is intended to reduce the practice of incorporating recreational vessels for the purpose of becoming eligible for a permit and, thus, allowing anglers to exceed the bag limits.

Recreational bag limits for mackerels would be revised from trip limits to daily bag limits with possession limited to one day's bag limit. A person who is on or who has fished on a charter vessel or headboat on a trip that spans more than 24 hours would be allowed to

possess no more than two daily bag limits, under certain specified conditions. Daily versus trip limits are expected to delay the attainment of the applicable annual recreational allocation and the possible consequent reduction of bag limits to zero. In effect, the recreational fisheries would be spread over a greater portion of the fishing year.

Amendment 5 proposes to prohibit the use of gear other than hook and line and run-around gillnets to fish in the EEZ for king mackerel from the Gulf migratory group, a stock that has been severely overfished. Currently, these two gears are the only ones in use for Gulf migratory group king mackerel, and purse seines and drift gillnets are specifically prohibited. Introduction of new and non-traditional fishing gear on a stock that has been severely overfished is not considered prudent because high catch-rate gear could cause a quota to be exceeded in a brief period. In addition, introduction of new gear could reduce the amount of king mackerel available to the current harvesters who are already on reduced quotas.

The fishery for cobia has exceeded its MSY every year since 1981. A daily bag limit of two fish per person is proposed to reduce the probability of stock depletion. The bag limit would apply in both the commercial and recreational fisheries. The Councils would include cobia in their annual preseason adjustments of MSYs, TACs, quotas, bag limits, or permits.

The proposed minimum size limit of 12 inches (30.5 centimeters) fork length or 14 inches (35.6 centimeters) total length for king mackerel is the same minimum size limit as currently exists for Spanish mackerel. Few king mackerel under the proposed minimum size limit are currently being harvested by hook and line. However, some fishermen are retaining undersized Spanish mackerel on the mistaken impression that they are king mackerel. A minimum size limitation for king mackerel identical with that for Spanish mackerel will facilitate compliance and reduce violations based on inaccurate identification. As is required for other species for which there is a minimum size limit, king mackerel would be required to be landed with head and fins intact so that size may be determined.

Amendment 5 would eliminate language from the FMP and the regulations that authorizes a fisherman to sell his catch of mackerel taken under a bag limit during periods when the commercial fishery is open. The Councils' intent is to remove Federal regulation in this regard so that state laws, regulations, and licensing requirements may apply to such sales. The prohibition of sale of mackerel taken in the EEZ after a commercial closure would remain in effect for the area of the closure. The current language authorizing sale of mackerel caught under a bag limit does not contribute to conservation of mackerel and constitutes an unnecessary supersession of state laws.

A more detailed discussion of these measures and of the revised problems and objectives of the FMP are contained in Amendment 5, the availability of which was announced in the **Federal Register** on March 23, 1990 (55 FR 11414).

Additional Changes Proposed by NOAA

NOAA proposes to provide guidance to applicants regarding the time required to obtain a permit. Language is proposed that encourages applications to be submitted at least 60 days prior to the date on which the applicant desires to have the permit made effective. NOAA will, under normal circumstances, issue a permit within 30 days after receipt of a complete application.

Heretofore, NOAA has not charged a fee for permits in this fishery but now intends to do so. The Magnuson Act and Amendment 1 to the FMP authorize charging a fee for the issuance of a permit, such fee not to exceed the administrative costs incurred in issuing the permit. The final rule implementing Amendment 1 limited the amount of any fee to $10, based on administrative cost estimate of similar permitting systems then in use in some states. Based on a detailed analysis of the direct and indirect administrative costs of issuing permits under the current requirements, NOAA proposes to charge $23 for each permit issued under § 642.4.

NOAA proposes to clarify the requirement that fish subject to a minimum size limit be landed with head and fins intact. Specifically, it is proposed to add language that such fish may be eviscerated but must otherwise be maintained in a whole condition through landing. This clarification is required to prevent the practice of cutting out fillets from the whole fish at sea and landing both the fillets and the remaining fish racks. Technically, the rack can be measured to ascertain compliance with the minimum size limits. However, such practice provides opportunities to evade the minimum size limits through filleting undersized fish and discarding their racks. It is difficult to correlate the number of racks to the number of fillets and impossible to definitively determine fish sizes from the fillets.

Classification

Section 304(a)(1)(D)(ii) of the Magnuson Act, as amended by (Pub. L. 99–659), requires the Secretary of Commerce (Secretary) to publish regulations proposed by a Council within 15 days of receipt of an FMP amendment and regulations. At this time, the Secretary has not determined that Amendment 5, which this proposed rule would implement, is consistent with the national standards, other provisions of the Magnuson Act, and other applicable law. The Secretary, in making that determination, will take into account the data, views, and comments received during the comment period.

This proposed rule is exempt from the procedures of E.O. 12291 under section 8(a)(2) of that order. It is being reported to the Director, Office of Management and Budget, with an explanation of why it is not possible to follow the procedures of that order.

The Under Secretary for Oceans and Atmosphere, NOAA, has initially determined that this proposed rule is not a "major rule" requiring the preparation of regulatory impact analysis under E.O. 12291. This proposed rule, if adopted, is not likely to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or georgraphical regions; or a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic markets.

The Councils prepared a regulatory impact review (RIR) which concludes that this rule, if adopted, would have the economic effects summarized as follows. The extension of management area to the Mid-Atlantic Council's area of authority could raise the cost of enforcing management measures but may have indirect benefits of constraining fishing mortality of mackerel to the accepted level. The change in fishing year for the Gulf group of Spanish mackerel would enable a more balanced distribution of the quota across geographical areas, particularly in Florida. Harvest cost may increase if the change would prompt movement of vessels to areas where fish congregate. The change in definitions of overfished and overfishing would allow the inclusion of socioeconomic factors in the determination of appropriate management measures while protecting stocks. The separation of responsibility

for pre-season adjustments of the Atlantic and Gulf groups of king and Spanish mackerel would facilitate the annual review and setting of TACs, now a shared responsibility of both Councils for all migratory stocks. This has required joint meetings of the Councils and consent of both to set each TAC. The change in bag limits from a trip to a daily basis would tend to distribute equally the recreational allocation among recreational fishermen. The for-hire sector would be minimally affected by this change. The deletion of language regarding sale of mackerel caught under a bag limit would eliminate conflict with and supersession of state laws and regulations, some of which provide for licensing of recreational and commercial fishermen and/or require a state license to sell fish. The prohibition on the use of gear types other than those currently used for the harvest of the Gulf group king mackerel would have no short-term effects. However, the long-term efficiency of this segment of the commercial fishery may be jeopardized by ruling out usage of more efficient gear types. The bag limit for cobia would have minimal impacts on both the commercial and recreational sectors. The minimum size limit for king mackerel would minimally impact the commercial sector. The impact of this size limit on the recreational sector is not known, but is expected to be minimal. Copies of the RIR may be obtained from the address listed above.

The RIR prepared by the Councils concludes that this rule will not have a significant economic impact on a substantial number of small entities for the reasons summarized as follows. The two-fish bag limit on cobia (1) will have virtually no impact on the commercial sector as commercial vessels generally catch only one or two cobia per trip and (2) will reduce landings of cobia by charter boats on only 4 percent of charter boat trips. The minimum size limit on king mackerel will not have a significant effect on commercial fishermen because only a few king mackerel less than the minimum size limit are caught by them. The extension of the management unit for king and Spanish mackerel into the Mid-Atlantic Fishery Council's area will not affect a substantial number of entities because (1) the landings of Spanish mackerel from that area are small (381,000 pounds in 1987) and less than 5 percent of those landings were from the EEZ, and (2) the landings of king mackerel from that area are even smaller (150,000 pounds) with an unknown portion of those landings coming from the EEZ. Accordingly, the General Counsel of the Department of Commerce certified to the Small Business Administration that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities; and an initial regulatory flexibility analysis was not prepared.

The Councils have determined that this rule will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal zone management programs of Alabama, Florida, Louisiana, Mississippi, North Carolina, South Carolina, New York, New Jersey, Delaware, Pennsylvania, Maryland, and Virginia. Texas and Georgia do not have approved coastal zone management programs. These determinations have been submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act.

The Councils prepared an environmental assessment (EA) that discusses the impact on the environment as a result of this rule. A copy of the EA may be obtained at the address listed above and comments on it are requested.

This proposed rule does not contain a new collection-of-information requirement for purposes of the Paperwork Reduction Act. However, expansion of the management area will affect two information collections approved under Office of Management and Budget control numbers 0648–0013 and 0648–0205.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

List of Subjects in 50 CFR Part 642

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 16, 1990.

William W. Fox, Jr.,

Assistant Administrator for Fisheries.

PART 642—COASTAL MIGRATORY PELAGIC RESOURCES OF THE GULF OF MEXICO AND SOUTH ATLANTIC

For the reasons set forth in the preamble, 50 CFR part 642 is proposed to be amended as follows:

1. The authority citation for part 642 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 642.1, paragraph (b) is revised to read as follows:

§ 642.1 Purpose and scope.

* * * * *

(b) This part governs conservation and management of—

(1) King and Spanish mackerel off the Atlantic coastal states south of the New York/Connecticut border and off the Gulf of Mexico coastal states; and

(2) All other coastal migratory pelagic fish off the Atlantic coastal states south of the Virginia/North Carolina border and off the Gulf of Mexico coastal states.

3. In § 642.2, the definition of *Overfishing* or *overfished* is removed and new definitions of *Conflict, EEZ, Overfished,* and *Overfishing* are added in alphabetical order to read as follows:

§ 642.2 Definitions.

* * * * *

Conflict means an incident at sea involving one or more fishing vessels—

(a) In which contact between one fishing vessel or its gear with another vessel or gear results in damage or destruction of fishing gear, loss of gear and associated catch through disappearance of the gear or its location buoys, preemption of fishing grounds, removal of catch from the gear, or vessel collision;

(b) In which there is imminent threat of one fishing vessel or its gear coming into contact with another vessel or gear; or

(c) In which competition for a resource between one fishing vessel or its gear and another vessel or gear—

(1) Results in displacement of a traditional fishery by new gear,

(2) Results in reduced catches in the traditional fishery, or

(3) Leads the Gulf of Mexico and South Atlantic Fishery Management Councils to conclude that the situation will result in displacement of a traditional fishery by new gear or in reduced catches in the traditional fishery. Competition is not in and of itself conflict; however, when competition is intensified, it can lead to conflict.

* * * * *

EEZ, as defined in § 620.2,

(a) For requirements related to king and Spanish mackerel, means the EEZ off the Atlantic coastal states south of the new York/Connecticut border and off the Gulf of Mexico coastal states;

(b) For requirements related to all other coastal migratory pelagic fish except bluefish, means the EEZ off the Atlantic coastal states south of the Virginia/North Carolina border and off the Gulf of Mexico coastal states; and

(c) For requirements related to bluefish, means the EEZ off the Gulf of Mexico coastal states.

* * * * *

Overfished means that the spawning stock biomass per recruit (SSBR) of a

mackerel or cobia stock is less than the target level percentage recommended and approved in accordance with the stock assessment procedures. The target level percentage will be recommended by the assessment group and approved by the Scientific and Statistical Committees of the Gulf of Mexico and South Atlantic Fishery Management Councils, and may not be less than 20 percent.

Overfishing means—

(a) That an overfished stock is being harvested at a rate that is not consistent with a program that has been established to rebuild the stock to the target level percentage; or

(b) That a stock that is not overfished is being harvested at a rate that, if continued, would lead to a state of the stock that would not allow a harvest at least equal to optimum yield on a continuing basis.

* * * * *

4. In § 642.4, a new paragraph (a)(4) is added; and paragraphs (b)(1), (c), and (d) are revised to read as follows:

§ 642.4 Permits and fees.

(a) * * *

(4) For a corporation to be eligible for an annual vessel permit specified in paragraph (a)(1) of this section, the earned income qualification specified in paragraph (b)(2)(vi) of this section must be met by, and the statement required by that paragraph must be submitted by, a shareholder or officer of the corporation or the vessel operator.

(b) * * *

(1) An application for a permit may be submitted to the Regional Director at any time but should be submitted at least 60 days prior to the date on which the applicant desires to have the permit made effective. An application must be signed by the owner or operator.

* * * * *

(c) *Issuance.* The Regional Director will issue a permit at any time for an April through March permit year. Upon receipt of a complete application, a permit will normally be issued in 30 days but may take as long as 60 days during peak periods of activity (February and March) or when complications exist. Until an annual vessel permit specified in paragraph (a)(1) of this section is on board, bag limits apply.

(d) *Fees.* A fee of $23 will be charged for each permit issued under paragraph (a) of this section. The appropriate fee must accompany each permit application.

* * * * *

5. In § 642.5, a new paragraph (f) is added to read as follows:

§ 642.5 Recordkeeping and reporting.

* * * * *

(f) For an owner or operator of a commercial, charter, or recreational vessel or a dealer or processor in the states from New York through Virginia, or in the waters off those states, for the purposes of paragraphs (c) and (e) of this section, the term "Science and Research Director" means the Science and Research Director, Northeast Fisheries Center, NMFS, Woods Hole, MA 02543, telephone 617–548–5123, or a designee.

6. In § 642.7, in paragraph (i), the words "vessel identification" between the words "official" and "number" are removed; in paragraphs (k) and (m), the references to "§ 642.28(c)(2)" are revised to read "§ 642.28(a)(4)(ii)"; in paragraph (l), the reference to "§ 642.24(c) or (d)" is revised to read "§ 642.24(b)(1) or (c)"; paragraphs (p) and (s) are removed and reserved; paragraph (x) is removed; and paragraphs (b), (d), (e), (j), (n), (q), (t), and (u) are revised to read as follows:

§ 642.7 Prohibitions.

* * * * *

(b) Possess in or harvest from the EEZ king or Spanish mackerel under the minimum size limit specified in § 642.23(a)(1), except for the catch allowance specified in § 642.23(a)(2).

* * * * *

(d) Fish in the EEZ for coastal migratory pelagic fish with prohibited gear or possess any coastal migratory pelagic fish in or from the EEZ abroad a vessel with prohibited gear aboard, as specified in § 642.24(a).

(e) Fish in the EEZ for king or Spanish mackerel with a gillnet with a mesh size less than the minimum allowable, or possess king or Spanish mackerel in or from the EEZ on board a vessel that has aboard a gillnet with a mesh size less than the minimum allowable, as specified in § 642.24(b).

* * * * *

(j) Purchase, barter, trade or sell, for the remainder of the appropriate fishing year, king or Spanish mackerel harvested in the EEZ from a specific migratory group or zone after the commercial allocation or quota for that migratory group or zone in § 642.21(a) or (c) has been reached and closure under § 642.22(a) has been invoked, as specified in § 642.28(a)(4)(iii). (This prohibition does not apply to trade in king or Spanish mackerel harvested, landed, and bartered, traded, or sold prior to the closure and held in cold storage by a dealer or processor.)

* * * * *

(n) Land, consume at sea, sell, or have in possession at sea or at time of landing king mackerel, Spanish mackerel, or cobia in excess of the bag limits specified in § 642.28 (a) and (b).

* * * * *

(q) Possess or land king mackerel, Spanish mackerel, or cobia without the head and fins intact, as specified in § 642.23(c).

* * * * *

(t) Operate a vessel in the EEZ with king mackerel, Spanish mackerel, or cobia aboard in excess of the cumulative bag limit applicable to the vessel, as specified in § 642.28(d).

(u) Transfer king mackerel, Spanish mackerel, or cobia at sea, as specified in § 642.28(e).

* * * * *

7. Section 642.20 is revised to read as follows:

§ 642.20 Seasons.

The fishing year for the Gulf migratory group of king mackerel for allocations and quotas begins on July 1 and ends on June 30. The fishing year for the Atlantic migratory groups of king and Spanish mackerel and the Gulf group of Spanish mackerel begins on April 1 and ends on March 31. The fishing year for all other coastal migratory pelagic fish begins on January 1 and ends on December 31.

8. In § 642.21, paragraphs (a)(3) and (c)(3) are revised to read as follows:

§ 642.21 Allocations and quotas.

(a) * * *

(3) A fish is counted against the commercial quota or allocation for the area where it is caught when it is first sold.

* * * * *

(c) * * *

(3) A fish is counted against the commercial allocation for the area where it is caught when it is first sold.

* * * * *

9. Section 642.23 is revised to read as follows:

§ 642.23 Size restrictions.

(a) *King and Spanish mackerel*—(1) *Minimum size.* The minimum size limit for the possession of king or Spanish mackerel in or taken from the EEZ is 12 inches (30.5 centimeters) fork length or 14 inches (35.6 centimeters) total length for both recreational and commercial fisheries, except for the incidental catch allowance under paragraph (a)(2) of this section.

(2) *Catch allowance.*

(i) A catch of king mackerel under the minimum size limit is allowed in the commercial fishery equal to five percent by weight of the total catch of king mackerel on board.

(ii) A catch of Spanish mackerel under the minimum size limit is allowed in the commercial fishery equal to five percent by weight of the total catch of Spanish mackerel on board.

(b) *Cobia.* The minimum size limit for the possession of cobia in or taken from the EEZ is 33 inches (83.8 centimeters) fork length or 37 inches (94.0 centimeters) total length for both recreational and commercial fisheries.

(c) *Head and fins intact.* A Spanish mackerel, king mackerel, or cobia possessed in the EEZ must have its head and fins intact and a Spanish mackerel, king mackerel, or cobia taken from the EEZ must have its head and fins intact through landing. Such Spanish mackerel, king mackerel, or cobia may be eviscerated but must otherwise be maintained in a whole condition.

10. Section 642.24 is revised to read as follows:

§ 642.24 Vessel, gear, equipment limitations.

(a) *Prohibited gear*—(1) *Drift gillnets.* The use of a drift gillnet to fish in the EEZ for coastal migratory pelagic fish is prohibited. A vessel in the EEZ or having fished in the EEZ with a drift gillnet aboard may not possess any coastal migratory pelagic fish.

(2) *Other Gear.*

(i) Fishing gear is prohibited for use in the EEZ for migratory groups of King and Spanish mackerel as follows:

(A) King mackerel Gulf migratory group—all gear other than hook-and-line and run-around gillnets.

(B) Spanish mackerel Gulf and Atlantic migratory groups—purse senines.

(ii) A vessel in the EEZ in an area specified in § 642.29 for a migratory group or having fished in the EEZ in such area with prohibited gear aboard may not possess any of the species for which that gear is prohibited.

(b) *Gill nets*—(1) *king mackerel.* The minimum allowable mesh size for a gillnet used to fish in the EEZ for King mackerel is 4¾ inches (12.1 centimeters) (stretched mesh). A vessel in the EEZ or having fished in the EEZ with a gillnet aboard that has a mesh size less than 4¾ inches (12.1 centimeters) may possess an incidental catch of King mackerel that does not exceed 10 percent of the total lawfully possessed catch by number of Spanish mackerel on board.

(2) *Spanish mackerel.* The minimum allowable mesh size for a gillnet used to fish in the EEZ for Spanish mackerel is 3½ inches (8.9 centimeters) (stretched mesh). A vessel in the EEZ or having fished in the EEZ with a gillnet aboard that has a mesh size less than 3½ inches (8.9 centimeters) may not possess any Spanish mackerel.

(c) *Purse seine catch allowance.* A vessel in the EEZ or having fished in the EEZ with a purse seine aboard will not be considered as fishing or having fished for king or Spanish mackerel in violation of a prohibition of purse seines under paragraphs (a)(2) of this section, or, in the case of king mackerel from the Atlantic migratory group, in violation of a closure effected in accordance with § 642.22(a), provided the catch of king mackerel does not exceed one percent or the catch of Spanish mackerel does not exceed 10 percent of the catch of all fish aboard the vessel. Incidental catch shall be calculated by both number and weight of fish. Neither calculation may exceed the allowable percentage. Incidentally caught king or Spanish mackerel are counted toward the allocations and quotas provided for under § 642.21 (a) or (c) and are subject to the prohibition of sale under § 642.22(a).

11. In § 642.27, in paragraph (e), at the end of the first sentence the phrase, "prior to the appropriate fishing year" is removed; and paragraphs (a) and (c) are revised to read as follows:

§ 642.27 Stock assessment procedures.

(a) The Councils will appoint an assessment group (Group) that will assess the condition of each stock of King mackerel, Spanish mackerel, and cobia in the management unit on an annual basis. Such assessment will include determinations of overfished and overfishing. When a determination of overfishing is made for a stock, the group will develop and recommend appropriate ABC ranges for recovery periods consistent with a program to rebuild in overfished stock. The Group will present a report of its assessment and recommendations to the Councils.

* * * * *

(c) If changes are needed in MSYs, TACs, allocations, quotas, bag limits, or permits, the Councils will advises the Regional Director in writing of their recommendations, accompanied by the assessment group's report, relevant background material, and public comment. Recommendations for the Atlantic groups of king and Spanish mackerel will be the responsibility of the South Atlantic Council, and recommendations for the Gulf groups of king and Spanish mackerel will be the responsibility of the Gulf Council. The Councils' reports shall be submitted each year by such date as may be specified by the Councils.

* * * * *

12. Section 642.28 is revised to read as follows:

§ 642.28 Bag and possession limits.

(a) *King and Spanish mackerel*—(1) *Bag limits.* A person who fishes for king or Spanish mackerel from the Gulf or Atlantic migratory group in the EEZ, except a person fishing under a permit specified in § 642.4(a)(1) and an allocation specified in § 642.21 (a) or (c), or possessing the purse seine incidental catch allowance specified in § 642.24(d), is limited to the following:

(i) *King mackerel Gulf migratory group.* (A) Possessing three king mackerel per person per day, excluding the captain and crew, or possessing two king mackerel per person per day, including the captain and crew, whichever is the greater, when fishing from a charter vessel.

(B) Possessing two king mackerel per person per day when fishing from other vessels.

(ii) *King mackerel Atlantic migratory group.* (A) Possessing two king mackerel per person per day from the southern area.

(B) Possessing three king mackerel per person per day from the northern area.

(iii) *Spanish mackerel Gulf migratory group.* (A) Possessing four Spanish mackerel per person per day from the eastern area.

(B) Possessing ten Spanish mackerel per person per day from the western area.

(iv) *Spanish mackerel Atlantic migratory group.* (A) Possessing four Spanish mackerel per person per day from the southern area.

(B) Possessing ten Spanish mackerel per person per day from the northern area.

(2) *Multi-day possession limit.* A person subject to a bag limit specified in paragraphs (a)(1) of this section may not possess in or from the EEZ during a single day, regardless of the number of trips or the duration of a trip, any king or Spanish mackerel in excess of such bag limit, except that a person who is on a trip that spans more than 24 hours may possess no more than two daily bag limits, provided such trip is aboard a charter vessel or headboat, and,

(i) The vessel has two licensed operators aboard as required by the U.S. Coast Guard for trips of over 12 hours, and

(ii) Each passenger is issued and has in possession a receipt issued on behalf of the vessel that verifies the length of the trip.

(3) *Areas.* (i) For the purposes of paragraphs (a)(1) (ii) and (iv) of this section, the boundary between the northern and southern areas is a line extending directly east from the

Georgia/Florida boundary (30°42'45.6" N. latitude) to the outer limit of the EEZ.

(ii) For the purposes of paragraph (a)(1)(iii) of this section, the boundary between the eastern and western areas (identical to the eastern and western zones in the commercial fishery) is a line extending directly south from the Alabama/Florida boundary (87°31'06" W. longitude) to the outer limit of the EEZ.

(4) *Fishing after a closure.* After a closure under § 642.22(a) is invoked for a commercial allocation or quota specified in § 642.21(a) or (c), for the remainder of the fishing year specified in § 642.20:

(i) A vessel permitted under § 642.4(a)(1) to fish under a commercial allocation for mackerel may not fish under a bag limit specified in paragraph (a)(1) of this section for the closed species/migratory group/zone, except as provided for under paragraph (a)(4)(ii) of this section.

(ii) A charter vessel permitted to fish under a commercial allocation for mackerel may continue to harvest fish under a bag and possession limit specified in paragraphs (a)(1) and (2) of this section provided it is under charter and the recreational allocation for the respective migratory group of mackerel under § 642.21(b) or (d) has not been reduced to zero under § 642.22(b).

(iii) The purchase, barter, trade, or sale of king or Spanish mackerel taken in the EEZ from the closed area is prohibited.

(b) *Cobia.* The daily bag and possession limit for cobia in or from the EEZ of the Gulf of Mexico and the Atlantic Ocean south of the Virginia/North Carolina border is two fish per person, without regard to whether or not the cobia are taken aboard a vessel with a commercial permit.

(c) *Combination of bag limits.* A person who fishes in the EEZ may not combine a bag or possession limit of this part with any bag or possession limit applicable to state waters.

(d) *Responsibility for bag and possession limits.* The operator of a vessel that fishes in the EEZ is responsible for the cumulative bag limit, ⅛⅛⅛ased on the number of persons aboard, applicable to that vessel.

(e) *Transfer of fish.* A person who whom a bag or possession limit specified in this section applies may not transfer at sea king mackerel, Spanish mackerel, or cobia—

(1) Taken in the EEZ; or

(2) In the EEZ, regardless of where such king mackerel, Spanish mackerel, or cobia was taken.

[FR Doc. 90-9138 Filed 4-17-90; 10:31 am]

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Notices

Federal Register
Vol. 55, No. 77
Friday, April 20, 1990

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Regulation; Meeting

Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of a meeting of the Committee on Regulation of the Administrative Conference of the United States. The meeting will be held from 10 a.m. to 1 p.m., on Friday, May 4, 1990, at the Administrative Conference of the United States, 2120 L Street, NW., Suite 500, Washington, DC 20037 (Library, 5th Floor).

The committee will meet to discuss a draft recommendation on risk information as a regulatory alternative for protecting health, safety and the environment. The full text of the draft recommendation was published at 55 FR 13538 (April 11, 1990).

For further information concerning this meeting, contact David Pritzker, Office of the Chairman, Administrative Conference of the United States, 2120 L Street, NW., Suite 500, Washington, DC. (Telephone: 202–254–7065.)

Attendance is open to the interested public, but limited to the space available. Persons wishing to attend should notify the Office of the Chairman at least one day in advance. The committee chairman, if he deems it appropriate, may permit members of the public to present oral statements at the meeting. Any member of the public may file a written statement with the committee before, during, or after the meeting. Minutes of the meeting will be available on request.

Dated: April 18, 1990.

Jeffrey S. Lubbers,

Research Director.

[FR Doc. 90–9350 Filed 4–19–90; 8:45 am]

BILLING CODE 6110–01–M

DEPARTMENT OF AGRICULTURE

Rural Electrification Administration

Associated Electric Cooperative, Inc.; Finding of No Significant Impact

AGENCY: Rural Electrification Administration, USDA.

ACTION: Finding of No Significant Impact related to the Rural Electrification Administration approval of a 345 kV transmission line project in northwestern Missouri.

SUMMARY: Notice is hereby given that the Rural Electrification Administration, pursuant to the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality Regulations (40 CFR parts 1500–1508), and the Rural Electrification Administration Environmental Policies and Procedures (7 CFR part 1794) has made a Finding of No Significant Impact with respect to a 345 kV transmission line project in northwestern Missouri. Associated Electric Cooperative, Inc., of Springfield, Missouri, may request approval from the Rural Electrification Administration necessary for its participation in the construction, ownership and operation of the project along with six other electric utilities in the area. The Rural Electrification Administration's Federal action related to this project may include the approval of financing assistance to Associated Electric Cooperative, Inc., for its share of the project costs, approval of contractual agreements between Associated Electric Cooperative, Inc., and the other participating utilities concerning construction, ownership and operation of the project, or approval for Associated Electric Cooperative, Inc., to use its general funds for part or all of its share of the project costs.

The six electric utilities participating in the project along with Associated Electric Cooperative, Inc., are: Nebraska Public Power District, Omaha Public Power District, Lincoln Electric System, Kansas City Power & Light Company, St. Joseph Light & Power Company and Iowa Power, Inc.

FOR FURTHER INFORMATION CONTACT: Mr. Alex M. Cockey, Jr. Director, Southeast Area—Electric, room 0270, South Agriculture Building, Rural Electrification Administration, Washington, DC 20250, telephone (202) 382–8436.

SUPPLEMENTARY INFORMATION: The proposed project consists of the construction of approximately 105 miles of a single circuit, 345 kV transmission line and the modifications of three existing substations. The project originates at the Nebraska Public Power District's Cooper Nuclear Station Substation northeast of Nemaha in Nemaha County, Nebraska, crosses the Missouri River into Atchison County, Missouri, and traverses in an easterly direction to N.W. Electric Power Cooperative's existing Fairport Substation north of Fairport in De Kalb County, Missouri. From there, the transmission line traverses in a southwesterly direction to St. Joseph Light & Power Company's existing St. Joseph Substation north of St. Joseph in Andrew County, Missouri. All three substations will be modified to accommodate the 345 kV transmission line. .

N.W. Electric Power Cooperative, one of Associated Electric Cooperative, Inc.'s, member generation and transmission cooperatives, will be the agent for Associated Electric Cooperative, Inc., for construction of the entire project except for the small portion of the transmission line from the Nebraska Public Power District's Cooper Nuclear Station Substation across the Missouri River to the first structure to be constructed on the east side of the river. Nebraska Public Power District will construct that segment of line and undertake the necessary modifications to its Cooper Nuclear Station Substation.

Alternatives evaluated to the project as proposed were no action, individual verses joint participation, new generation facilities, and load management. Design alternatives for the project were considered as were alternate corridors for the transmission line.

The Rural Electrification Administration, in accordance with its environmental policies and procedures required that Associated Electric Cooperative, Inc., develop a Macro-corridor Study and Alternative Evaluation for the proposed project. These documents were reviewed and made available to agencies and the public prior to, during and after scoping

meetings held in Jefferson City, Savannah and Fairfax, Missouri. From the information in the Macro-corridor Study, the Alternative Evaluation and input from various agencies and the public, Associated Electric Cooperative, Inc., prepared an Environmental Analysis of the project. Based on the Macro-corridor Study, Alternative Evaluation and Environmental Analysis submitted by Associated Electric Cooperative, Inc., and information gathered as a result of the interagency and public scoping meetings, the Rural Electrification Administration prepared an Environmental Assessment to assess the potential environmental impacts of the project. The Envrionmental Assessment is attached to, and incorporated, as a part of the Finding of No Significant Impact.

The Rural Electrification Administration has concluded from its assessment that the project will have no significant impact on the health and welfare of people living or working in the project area, water quality, air quality, wetlands, floodplains, prime farmland or cultural resources. The project will have no affect on Federally listed threatened and endangered species or designated critical habitat and will not jeopardize the continued existence of proposed species or destroy or adversely modify proposed critical habitat. There are no prime rangelands, prime forestlands, National Forests, National Wilderness Areas, National Landmarks, or streams and rivers on, or under review for, the Wild and Scenic River System in the project area. No other potential significant impacts resulting from the construction, operation and maintenance of this project have been identified. Therefore, the Rural Electrification Administration has determined that its action related to this project will have no significant impact on the quality of the human environment and has subsequently reached a Finding of No Significant Impact.

Although there will be no significant impacts on the 100-year floodplain or wetlands, both are within the project area and may be crossed by the transmission line. The Rural Electrification Administration has concluded that there is no practicable alternative that completely avoids the 100-year floodplain or wetlands.

Copies of the Environmental Assessment and Finding of No Significant Impact can be obtained from the Rural Electrification Administration at the address provided herein or from Mr. Charles Means, Associated Electric Cooperative, Inc., P.O. Box 754, Springfield, Missouri 65801, telephone number (417) 881-1204.

There will be a 30-day period which will begin on either the date this notice is published in the **Federal Register** or it is published in newspapers with general circulation in the project area—whichever is later. Those wishing to comment on the Finding of No Significant Impact should do so within this 30-day comment period to ensure their comments are taken into consideration prior to the Rural Electrification Administration's final action related to project. The Rural Electrification Administration will take no action that would approve clearing or construction activities prior to the expiration of the 30-day comment period. Comments should be sent to the Rural Electrification Administration at the address given in this notice.

Dated: April 16, 1990.

John H. Arnesen,

Assistant Administrator—Electric.

[FR Doc. 90-9136 Filed 4-19-90; 8:45 am]

BILLING CODE 3410-15-M

DEPARTMENT OF COMMERCE

Agency Form Under Review by Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: International Trade Administration, Commerce.

Title: Phase III—Research Prototype Reaction (US&FCS Promotional Materials).

Form numbers: Agency—ITA-4105P. OMB—0625-0198 (Expired).

Type of request: Reinstatement of a previously approved collection for which approval has expired.

Burden: 45 respondents; 15 reporting hours.

Average hours per response: 20 minutes.

Needs and uses: Reinstatement is being requested as the contractor (advertising agency) has yet to do the work. This collection supports the International Trade Administration's (ITA's) export awareness promotion campaign to rectify General Accounting Office (GAO) criticisms of Commerce programs. It will determine the relative strengths and weaknesses of previous U.S. and Foreign Commercial Service (US&FCS) promotional material. The campaign will focus on increasing participation of small and medium-size U.S. firms in trade missions, trade fairs, catalog and video catalog exhibitions, "Matchmaker," trade delegations, *Commercial News USA* magazine, seminars, and special events. Companies participating in the market research campaign will review promotional materials developed by an advertising agency and evaluate if the final products motivate exporting among small to medium-sized firms.

Affected public: Businesses or other for profit; small businesses or organizations.

Frequency: One-time only.

Respondent's obligation: Voluntary.

OMB desk officer: Donald Arbuckle, 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-3271, Department of Commerce, room 6622, 14th and Constitution Avenue NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Donald Arbuckle, OMB Desk Officer, room 3208 New Executive Office Building, Washington, DC 20503.

Dated: April 16, 1990.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 90-9182 Filed 4-19-90; 8:45 am]

BILLING CODE 3510-CW-M

International Trade Administration

[A-201-802]

Postponement of Final Antidumping Duty Determination and Postponement of Antidumping Duty Public Hearing; Gray Portland Cement and Clinker From Mexico

AGENCY: International Trade Administration, Import Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: This notice informs the public that we have received a request from a respondent in this investigation, CEMEX, S.A., to postpone the final determination, as permitted in section 735(a)(2)(A) of the Tariff Act of 1930, as amended (the Act), (19 U.S.C. 1673d(a)(2)(A)).

Based on this request, we are postponing our final determination as to whether sales of gray portland cement and clinker from Mexico have occurred at less than fair value until not later than July 10, 1990. We are also postponing our tentative public hearing

date in the antidumping duty investigation until June 19, 1990.

EFFECTIVE DATE: April 20, 1990.

FOR FURTHER INFORMATION CONTACT: Nancy Saeed, Brad Hess, or Louis Apple at (202) 377–1777, 377–3773 or 377–1769, respectively, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION: On April 12, 1990, we published a preliminary determination of sales at less than fair value of this merchandise. This notice stated that if the investigation proceeded normally, we would make our final determination by June 19, 1990.

On April 9, 1990, CEMEX, S.A. requested a postponement of the final determination in the antidumping duty investigation until not later than July 10, 1990, pursuant to section 735(a)(2)(A) of the Act (19 U.S.C. 1673(a)(2)(A)). This respondent accounts for over 60 percent of the exports of the subject merchandise to the United States. If exporters who account for a significant proportion of exports of the subject merchandise under investigation request a postponement of the final determination following a preliminary affirmative determination, we are required, absent compelling reasons to the contrary, to grant the request. We have received no objections. Accordingly, we are postponing the date of the final antidumping duty determination until not later than July 10, 1990.

Public Comment: In accordance with § 353.38 of the Department's regulations (19 CFR 353.38), if requested we will hold a public hearing to afford interested parties an opportunity to comment on the preliminary determination in the antidumping duty investigation at 9:30 a.m. on June 19, 1990, at the U.S. Department of Commerce, Room 3708, 14th Street and Constitution Avenue NW., Washington, DC 20230.

Individuals who wish to participate in the hearing must submit a request to the Assistant Secretary for Import Administration, room B–099, at the above address within ten days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; (3) the reasons for attending; and (4) a list of the issues to be delivered.

Ten copies of the business proprietary version and five copies of the public version of case briefs must be submitted to the Assistant Secretary by June 8, 1990. Ten copies of the business proprietary version and five copies of the public version of rebuttal briefs must be submitted to the Assistant Secretary by June 15, 1990.

An interested party may make an affirmative presentation at the public hearing only on arguments included in that party's case brief, and make a rebuttal presentation only on arguments included in that party's rebuttal brief. Written arguments should be submitted in accordance with § 353.38 of the Commerce Department's regulations (19 CFR 353.38), and will be considered only if received within the time limits specified in this notice.

The U.S. International Trade Commission is being advised of this postponement in accordance with section 735(d) of the Act. This notice is published pursuant to section 735(d) of the Act.

Dated: April 13, 1990.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 90–9231 Filed 4–19–90; 8:45 am]

BILLING CODE 3510–05–M

[A–437–601]

Tapered Roller Bearings From Republic of Hungary; Court Decision and Suspension of Liquidation

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice.

SUMMARY: On July 26, 1989, the United States Court of International Trade ("CIT") reversed a decision by the International Trade Commission ("ITC") to cumulate low quality Hungarian tapered roller bearings (TRBs) with high quality Japanese and Italian TRBs for purposes of determining injury to the domestic industry. The CIT remanded the decision to the ITC with instructions to cumulate only those TRBs sold at less than fair value which satisfy the "reasonable overlap" test. *Marsuda-Rodgers Int'l* v. *United States*, 13 CIT ———, 719 F. Supp. 1092 (1989). On December 21, 1989, the Commission filed a unanimous remand determination stating that the U.S. industry was neither materially injured nor threatened with such injury. *Tapered Roller Bearings and Parts Thereof from Hungary*, Inv. No. 731–TA–341 (Final-Remand), USITC Pub. 2245 (Dec. 1989). This remand determination has now been affirmed by the CIT. *Marsuda-Rodgers* v. *United States*, Court No. 87–07–0072, Slip Op. 90–35 (April 3, 1990).

In accordance with the decision of the Court of Appeals for the Federal Circuit ("CAFC") in *Timken Company* v. *United States*, Slip Op. 89–1489 (January 4, 1990), Commerce will direct the U.S. Customs Service to suspend liquidation of all entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after April 13, 1990.

EFFECTIVE DATE: April 13, 1990.

FOR FURTHER INFORMATION CONTACT: Kimberly Hardin, Mary Jenkins, or Mary S. Clapp, Office of Antidumping Investigations, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377–8371, 377–1756 or 377–3965, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 5, 1987, the ITC issued an affirmative final injury determination in *Tapered Roller Bearings and Parts Thereof from Hungary*, Inv. No. 731–TA–341 (Final), USITC Pub. 1983 (June 1987). In its determination, the ITC cumulated low quality Hungarian TRBs with high quality Japanese and Italian TRBs for purposes of determining injury to the domestic industry.

Subsequent to publication of Commerce's antidumping duty order, counsel for an importer of Hungarian TRBs filed a lawsuit challenging both the Commerce and ITC final determinations. On July 26, 1989, the CIT reversed and remanded the ITC's cumulation methodology. *Marsuda-Rodgers Int'l* v. *United States*, 13 CIT ———, 719 F. Supp. 1092 (1989). On December 21, 1989, the Commission filed a unanimous remand determination stating that, based on traditional single country injury analysis, the U.S. industry was neither materially injured nor threatened with such injury. This remand determination has now been affirmed by the CIT. *Marsuda-Rodgers Int'l* v. *United States*, Court No. 87–07–00772, Slip Op. 90–35 (April 3, 1990).

Suspension of Liquidation

In its decision in *Timken Company* v. *United States*, Court No. 89–1489 (January 4, 1990), the CAFC held that Commerce must publish notice of a decision of the CIT or the CAFC which is not in harmony with Commerce's determination. Publication of this notice fulfills that obligation. The CAFC also held that in such a case Commerce must suspend liquidation until there is a "conclusive" decision in the action. Therefore, Commerce must suspend liquidation pending the expiration of the

period to appeal the CIT's April 3, 1990 affirmation of the ITC's remand results in this case, or pending a final decision of the CAFC if that affirmation is appealed.

Because entries of the subject merchandise are currently being suspended pursuant to the antidumping duty order in effect, Commerce need not order Customs to suspend liquidation. Commerce will not order the lifting of the suspension of liquidation of entries entered or withdrawn from warehouse for consumption on or after April 13, 1990 before there is a conclusive court decision in this lawsuit.

Dated: April 13, 1990.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 90-9232 Filed 4-19-90; 8:45 am]

BILLING CODE 3510-DS-M

Non-magnetic High Manganese Steel Plate; Short Supply Determination

AGENCY: Import Administration/ International Trade Administration, Commerce.

ACTION: Notice of short-supply determination on certain non-magnetic high manganese steel plate.

Short-Supply Review Number: 15.

SUMMARY: The Secretary of Commerce ("Secretary") hereby grants a short-supply allowance for 750 metric tons of certain non-magnetic high manganese steel plate for April-December 1990 under the U.S.-EC and U.S.-Japan steel arrangements.

EFFECTIVE DATE: April 13, 1990.

FOR FURTHER INFORMATION CONTACT: Richard O. Weible, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, room 7866, 14th Street and Constitution Avenue NW., Washington, DC 20230 (202) 377-0159.

SUPPLEMENTARY INFORMATION: On March 29, 1990, the Secretary received an adequate short-supply petition from Clifton Steel Company ("Clifton") requesting a short-supply allowance for 750 metric tons of this product for 1990 under Article 8 of the Arrangement Between the European Coal and Steel Community and the European Economic Community, and the Government of the United States of America Concerning Trade in Certain Steel Products, and paragraph 8 of the U.S.-Japan Arrangement Concerning Trade in Certain Steel Products. Clifton requested short supply for this product because no domestic mill is currently able to produce this material and because its foreign suppliers are unable to meet Clifton's needs through regular export licenses. The Secretary conducted this short-supply review pursuant to section 4(b)(4)(A) of the Steel Trade Liberalization Program Implementation Act, Pub. L. No. 101-221, 103 Stat. 1886 (1989) ("the Act"), and § 357.102 of the Department of Commerce's Short-Supply Regulations, published in the **Federal Register** on January 12, 1990, 55 FR 1348 ("Commerce's Short-Supply Regulations").

The product meets the following specifications:

Chemistry: Mn, 11 to 14%; C, 1.15%; Si, −0.06%; P, <0.04%; S, <0.06%; Cr, <5%.
Thickness: 3/16 to 2-½ inches.
Width: 60 to 96 inches.
Length: 240 to 324 inches.
Tolerances: as per ASTM-A6.
Hardness: BHN 200 in delivery condition (work hardens under impact to BHN 500-600).
Yield strength: 50 KSI.
Tensile strength: 125 KSI.
Elongation: 30%.

Action

On March 29, 1990, the Secretary established an official record on this short-supply request (Case Number 14) in the Central Records Unit, room B-099, Import Administration, U.S. Department of Commerce at the above address. Section 4(b)(4)(B)(i) of the Act and § 357.106(b)(1) Commerce's Short-Supply Regulations require the Secretary to apply a rebuttable presumption that a product is in short supply and to make a determination with respect to a short-supply petition not later than the 15th day after the petition is filed if the Secretary finds that one of the following conditions exists: (1) The raw steelmaking capacity utilization in the United States equals or exceeds 90 percent; (2) the importation of additional quantities of the requested steel product was authorized by the Secretary during each of the two immediately preceding years; or (3) the requested steel product is not produced in the United States. The Secretary has granted short-supply for this product during each of the two immediately preceding years. Therefore, the Secretary has applied a rebuttable presumption that this product is presently in short supply in accordance with section 4(b)(4)(B)(i)(II) of the Act and § 357.106(b)(1)(ii) of Commerce's Short-Supply Regulations.

Unless domestic steel producers provided proof that they could and would produce the requested quantity of this product within the desired period of time, provided it represented a normal order-to-delivery period, the Secretary would issue a short-supply allowance not later than April 13, 1990. On April 3, 1990, the Secretary published a notice in the **Federal Register** announcing a review of this request and providing domestic steel producers an opportunity to rebut the presumption of short supply. All comments were required to be received no later than April 10, 1990. No comments were received.

Conclusion

Since the Secretary received no comments to the **Federal Register** notice by potential suppliers to rebut the Secretary's presumption of short supply for the requested product, the Secretary hereby grants, pursuant to section 4(b)(4)(A) of the Act and § 357.102 of Commerce's Short-Supply Regulations, a short-supply allowance for 750 metric tons of the requested non-magnetic high manganese steel plate for April-December 1990 under Article 8 of the Arrangement Between the European Coal and Steel Community and the European Economic Community, and the Government of the United States of America Concerning Trade in Certain Steel Products, and paragraph 8 of the U.S.-Japan Arrangement Concerning Trade in Certain Steel Products.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 90-9234 Filed 4-19-90; 8:45 am]

BILLING CODE 3510-DS-M

[C-122-507]

Certain Fresh Atlantic Groundfish From Canada: Notice of Court Decision and Suspension of Liquidation

AGENCY: International Trade Administration, Import Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: On October 27, 1989, the United States Court of International Trade ("CIT") ordered the Department of Commerce ("Commerce") to recalculate the benefits from certain Government of Canada programs which Commerce found to be countervailable in its final countervailing duty determination on certain fresh Atlantic groundfish from Canada. *Comeau Seafoods, Ltd., St. Mary's Bay Fisheries, Ltd., National Sea Products, Ltd., and Fisheries Council of Canada* v. *United States*, Court No. 86-06-00751, Slip Op. 89-155 (October 27, 1989). Commerce filed the required remand results with the CIT on February 8, 1990. On March 13, 1990, the CIT rendered a judgment which affirmed, in its entirety, the remand determination by Commerce.

In accordance with the decision of the Court of Appeals for the Federal Circuit ("CAFC") in *Timken Company* v. *the United States*, Court No. 89–1489 (January 4, 1990), Commerce will not order the liquidation of the subject merchandise entered or withdrawn from warehouse for consumption on or after March 23, 1990 prior to a conclusive decision in this lawsuit.

EFFECTIVE DATE: March 23, 1990.

FOR FURTHER INFORMATION CONTACT: Vincent Kane or Roy A. Malmrose, Office of Countervailing Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, Telephone: (202) 377–2815 or 377–5414.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 1986, Commerce published notice of its *Final Affirmative Countervailing Duty Determination: Certain Fresh Atlantic Groundfish from Canada*, 51 FR 10041 (March 24, 1986). That determination noted Commerce's finding of an estimated net subsidy of 5.82 percent *ad valorem*. On May 15, 1986, Commerce published a countervailing duty order, instructing the U.S. Customs Service to collect a cash deposit equal to 5.82 percent *ad valorem* on all entries of the subject merchandise entered or withdrawn from warehouse for consumption on or after that date. 51 FR 17785. No administrative review has ever been requested.

Subsequent to Commerce's countervailing duty determination and order, counsel for Canadian respondents filed a lawsuit challenging Commerce's determination. On October 27, 1989, the CIT remanded the final determination to Commerce for recalculation of certain countervailable benefits. On February 8, 1990, Commerce issued remand results that determined a recalculated net subsidy rate of 5.40 percent *ad valorem*. The CIT affirmed Commerce's remand results in their entirety on March 13, 1990.

Suspension of Liquidation

In its decision in *Timken Company* v. *United States*, Court No. 89–1489 (January 4, 1990), the CAFC held that Commerce must publish notice of a decision of the CIT or the CAFC which is not in harmony with Commerce's determination. Publication of this notice fulfills that obligation. The CAFC also held that in such a case, Commerce must suspend liquidation until there is a "conclusive" decision in the action. Therefore, Commerce must suspend liquidation pending the expiration of the period to appeal the CIT's March 13, 1990 affirmation of Commerce's remand results in this case, or pending a final decision of the CAFC if that affirmation is appealed.

Because entries of the subject merchandise are currently being suspended pursuant to the countervailing duty order in effect, Commerce need not order Customs to suspend liquidation. Commerce will not order the lifting of the suspension of liquidation of entries entered or withdrawn from warehouse for consumption on or after March 23, 1990 before there is a conclusive court decision in this lawsuit.

Dated: April 9, 1990.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 90–9233 Filed 4–19–90; 8:45 am]

BILLING CODE 3510–DR–M

National Oceanic and Atmospheric Administration

Endangered Species; Application for Permit; Southwest Fisheries Center, National Marine Fisheries Service (P77#41)

Notice is hereby given that the Applicant has applied in due form for a Permit to take endangered species as authorized by the Endangered Species Act of 1973 (16 U.S.C. 1531–1543) and the National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS) regulations governing endangered fish and wildlife permits (50 CFR parts 217–222).

1. *Applicant:* Dr. Izadore Barrett, Director, Southwest Fisheries Center, NOAA, National Marine Fisheries Service, La Jolla, California 92038.

2. *Type of Permit:* Scientific Purposes.

3. *Name and Number of Species:*

Green turtle (*Chelonia mydas*)
Olive ridley sea turtle (*Lepidochelys olivacea*)
Loggerhead turtle (*Caretta caretta*)
Hawksbill turtle (*Eretmochelys imbricata*)
Leatherback turtle (*Dermochelys coriacea*)

The species composition and numbers of turtles to be taken are unknown at this time. Species composition and numbers of sea turtles which become entangled in the high-seas commercial drift net fishery are being estimated by NMFS and foreign scientific observers placed aboard the foreign commercial driftnet fisheries vessels and research vessels. Therefore, an unlimited number of turtles to be measured, photographed, tagged and released are proposed in this application.

4. *Type of Take:* The applicant proposes to identify, measure photograph, tag and release turtles incidentally entangled in high-seas driftnets brought aboard foreign commercial driftnet vessels of Japan, the Republic of Korea and the Republic of China (Taiwan) or encountered by foreign or domestic fishery research vessels. The project proposed will facilitate impact assessment of this fishery on sea turtles and utilize the opportunity for research on sea turtle population biology. Comatose turtles taken will be resuscitated by NMFS observers and released. In addition, any turtles found dead will be frozen for eventual transport to the NMFS Honolulu Laboratory for biometrics, necropsy, and analysis of stomach contents.

5. *Location and Duration of Activity:* The observation and tagging efforts will be conducted in the North Pacific between April and January aboard foreign commercial driftnet vessels and aboard foreign or domestic fishery research vessels in international waters of the high-seas between the latitudes of about 25 and 50 degrees N, and the longitudes of approximately 145 degrees W and 145 E. Scientists and scientific observers aboard these vessels will measure and tag the turtles for the start of the 1990 high-seas driftnet fishing season (April 1, 1990) to an estimated date which reflects a reasonable likelihood of successful agreements between the U.S. and foreign governments involved in driftnet fishing for cooperative fishery management and research through the 1992 fishing season (December 31, 1992). Dead turtles collected for further study would be imported to the NMFS Honolulu laboratory.

Written data or views, or requests for a public hearing on this application should be submitted to the Assistant Administrator for Fisheries, NOAA, NMFS, National Oceanic and Atmospheric Administration, 1335 East-West Highway, Silver Spring, Maryland 20910, by May 21, 1990. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular application would be appropriate. The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries. All statements and opinions contained in this application are summaries of those of the Applicant and do not

necessarily reflect the views of NOAA, NMFS.

Documents submitted in connection with the above application are available for review by interested persons in the following offices:

Office of Protected Resources, NOAA, NMFS, 1335 East-West Highway, Silver Spring, Maryland 20910;

and

Director, Southwest Region, NOAA, NMFS, 300 South Ferry Street, Terminal Island, California 90731–7415.

Dated: April 16, 1990.

Nancy Foster,

Director, Office of Protected Resources.

[FR Doc. 90–9169 Filed 4–19–90; 8:45 am]

BILLING CODE 3510–22–M

Application for Modification to Permit No. 691; Southwest Fisheries Center, National Marine Fisheries Service

Notice is hereby given that the Applicant has applied in due form for a modification to permit No. 691 to take endangered species as authorized by the Endangered Species Act of 1973 (16 U.S.C. 1531–1543) and the National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS) regulations governing endangered fish and wildlife permits (50 CFR part 217–222).

1. *Applicant:* Dr. Izadore Barrett, Director, Southwest Fisheries Center, NOAA, National Marine Fisheries Service, La Jolla, California 92038.

2. *Type of Permit:* Scientific Purposes.

3. *Name and Number of Species:* The proposed modifications include expansion of the species of turtles sought for research to include, in addition to the olive ridley sea turle, (*Lepidochelys olivacea*) all other species encountered in the eastern tropical Pacific. The additional species are:

Hawksbill turtle (*Eretmochelys imbricata*)
Leatherback turtle (*Dermochelys coriacea*)
Green and black turtle (*Chelonia mydas, Chelonia mydas agassizi*)
Loggerhead turtle (*Caretta caretta*)

4. *Type of Take:* The applicant proposes to modify the type of take by using satellite telemetry (Tiros-Argos satellite system) to gain a better understanding of the movements of turtles in the Eastern Tropical Pacific (ETP). Satellite tracking of the movements of sea turtles will supplement and enhance the current tagging program. The two methods of attaching satellite transmitter tags to turtles being considered by the Southwest Fisheries Center include: (1) A float design attached to the turtle by a stainless steel cable with an eye bolt fastened through a hole drilled in the pygal bone of the carapace; (2) a backpack design attached directly to the highest point of the carapace with either dental acrylic or fiberglass, and a harness. The tags are expected to fall off the animal after 12 months.

5. *Location and Duration of Activity:* A maximum of five satellite tags per year, over the next five years will be attached to captured animals during the Monitoring of Porpoise Stocks (MOPS) cruises. The tagging will take place in the eastern tropical Pacific.

Written data or views, or requests for a public hearing on this permit modification should be submitted to the Assistant Administrator for Fisheries, NMFS, NOAA, 1335 East-West Highway, Silver Spring, Maryland 20910, by May 21, 1990. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular permit modification would be appropriate. The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries. All statements and opinions contained in this application are summaries of those of the Applicant and do not necessarily reflect the views of NOAA, NMFS.

Documents submitted in connection with the above permit modification are available for review by interested persons in the following offices:

Office of Protected Resources, NOAA, NMFS, 1335 East-West Highway, Silver Spring, Maryland 20910;

and

Director, Southwest Region, NOAA, NMFS, 300 South Ferry Street, Terminal Island, California 90731–7415.

Dated: April 16, 1990.

Nancy Foster,

Director, Office of Protected Resources.

[FR Doc. 90–9170 Filed 4–19–90; 8:45 am]

BILLING CODE 3510–22–M

Application for Modification To Permit No. 456; Gulf Specimen Marine Laboratories, Inc.

Notice is hereby given that the Applicant has applied in due form for a modification to permit No. 456 to take endangered species as authorized by the Endangered Species Act of 1973 (16 U.S.C. 1531–1543) and the National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS) regulations governing endangered fish and wildlife permits (50 CFR part 217–222).

1. *Applicant:* Dr. Ann Rudloe, Gulf Specimen Marine Laboratories, Inc., P.O. Box 237, Panacea, Florida 32346.

2. *Type of Permit:* Scientific Purposes.

3. *Name and Number of Species:* Kemp's ridley sea turtles (*Lepidochelys kempi*). The permit modification proposes to increase the numbers of turtles taken from twenty individuals to one hundred individuals.

4. *Type of Take:* The applicant proposes to conduct scientific studies on Kemp's ridleys to provide fishery independent data on their occurrence, seasonality and population structure in the shallow, inshore waters of the northeastern Gulf of Mexico. The study will develop population data necessary to write a management plan for this species and will allow development of sampling procedures adequate for later efforts to calculate a poplulation estimate for this species.

5. *Location and Duration of Activity:* The collection efforts will be adjacent to Piney Island and Shell Point Reef, Wakulla County, Florida; Alligator Point and off the Carrabella River, Franklin County, Florida. This modification also proposes to extend the permit period from December 22, 1990 to April 30th, 1991.

Written data or views, or requests for a public hearing on this permit modification should be submitted to the Assistant Administrator for Fisheries, NMFS, NOAA, 1335 East-West Highway, Silver Spring, Maryland 20910, by May 21, 1990. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular permit modification would be appropriate. The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries. All statements and opinions contained in this application are summaries of those of the Applicant and do not necessarily reflect the views of NOAA, NMFS.

Documents submitted in connection with the above application are available for review by interested persons in the following offices:

Office of Protected Resources, NOAA, NMFS, 1335 East-West Highway, Silver Spring, Maryland 20910;

and

Director, Southwest Region, NOAA, NMFS, 300 South Ferry Street, Terminal Island, California 90731–7415.

Dated: April 16, 1990.

Nancy Foster,

Director, Office of Protected Resources.

[FR Doc. 90-9171 Filed 4-19-90; 8:45 am]

BILLING CODE 3510-22-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of a Request for Bilateral Consultations With the Government of Thailand

April 16, 1990.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Notice.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For further information on categories on which consultations have been requested, call (202) 377-3740.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

On March 28, 1990, under the terms of Article 3 of the MFA, the Government of the United States requested consultations with the Government of Thailand regarding Categories 340/640 (cotton and man-made fiber shirts, not knit), 351/651 (cotton and man-made fiber nightwear and pajamas) and 361 (cotton sheets), produced or manufactured in Thailand.

The purpose of this notice is to advise the public that, if no solution is agreed upon in consultations with Thailand, the Committee for the Implementation of Textile Agreements may later establish limits for the entry and withdrawal from warehouse for consumption of textile products in Categories 340/640, 351/651 and 361, produced or manufactured in Thailand and entered, regardless of the date of export, during the twelve-month period which began on March 28, 1990 and extends through March 27, 1991, of not less than 367,213 dozen (Categories 340/640), 39,776 dozen (Categories 351/651) and 377,962 numbers (Category 361).

Summary market statements concerning these categories follow this notice.

Anyone wishing to comment or provide data or information regarding the treatment of Categories 340/640, 351/651 and 361, or to comment on domestic production or availability of products included in these categories, is invited to submit 10 copies of such comments or information to Auggie D. Tantillo, Chairman, Committee for the Implementation of Textile Agreements, U.S. Department of Commerce, Washington, DC 20230, ATTN: Public Comments.

Because the exact timing of the consultations is not yet certain, comments should be submitted promptly. Comments or information submitted in response to this notice will be available for public inspection in the Office of Textiles and Apparel, room H3100, U.S. Department of Commerce, 14th and Constitution Avenue NW., Washington, DC.

Further comment may be invited regarding particular comments or information received from the public which the Committee for the Implementation of Textile Agreements considers appropriate for further consideration.

The solicitation of comments regarding any aspect of the agreement or implementation thereof is not a waiver in any respect of the exemption contained in 5 U.S.C. 553(a)(1) relating to matters which constitute "a foreign affairs function of the United States."

The United States remains committed to finding a solution concerning Categories 340/640, 351/651 and 361. Should such a solution be reached in consultations with the Government of Thailand, further notice will be published in the **Federal Register**.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 54 FR 50797, published on December 11, 1989). Also see 54 FR 49333, published on November 30, 1989.

Auggie D. Tantillo,

Chairman, Committee for the Implementation of Textile Agreements.

Thailand—Market Statement for Men's and Boys' Cotton and Man-Made Fiber Woven Shirts—Category 340/640

May 1990.

Import Situation and Conclusion

U.S. imports of men's and boys' cotton and man-made fiber woven shirts (Category 340/640) from Thailand reached 374,607 dozen during the year ending January 1990, 33 percent above the 280,851 dozen imported a year earlier. During 1989, imports of Category 340/640 from Thailand reached 367,213 dozen compared to 254,370 dozen imported during 1988, an increase of 44 percent.

The sharp and substantial increase in Category 340/640 imports from Thailand is causing disruption in the U.S. market for men's and boys' cotton and man-made fiber woven shirts.

U.S. Production and Market Share

U.S. production of men's and boys' cotton and man-made fiber woven shirts (Category 340/640) remained relatively flat during 1987 and 1988, averaging 16,171,000 dozen annually. During the first nine months of 1989, production of Category 340/640 dropped to 11,703,000 dozen, 8 percent below the 12,666,000 dozen produced in the same period of 1988. The share of this market held by domestic manufacturers fell from 39 percent in the first nine months of 1988 to 37 percent in the first nine months of 1989.

U.S. Imports and Import Penetration

U.S. imports of men's and boys' cotton and man-made fiber woven shirts (Category 340/640) began increasing in 1989 and reached 26,591,000 dozen, a 3 percent rise over the 1988 level. During the year ending January 1990, Category 340/640 imports reached 26,789,000 dozen, 5 percent above the 25,429,000 dozen imported a year earlier. The ratio of imports to domestic production increased 13 percentage points in the first nine months of 1989, reaching 172 percent.

Duty-Paid Value and U.S. Producers' Price

Approximately 78 percent of Category 340/640 imports from Thailand during 1989 entered under HTSUSA numbers 6205.20.2050—men's cotton woven shirts, of yarn-dyed fabric; 6205.20.2065—men's cotton woven shirts, other than of yarn-dyed fabric; 6205.30.2010—men's man-made fiber woven dress shirts, of yarn-dyed fabric; and 6205.30.2030—men's man-made fiber woven dress shirts, other than of yarn-dyed fabric; 6205.30.2050—men's man-made fiber woven shirts, other than dress type, and of yarn-dyed fabric. These shirts entered the U.S. at landed duty-paid values below U.S. producers' prices for comparable shirts.

Thailand—Market Statement Cotton and Man-made Fiber Pajamas and Other Nightwear—Category 351/651

March 1990.

Import Situation and Conclusion

U.S. imports of men's and boys' and women's and girls' cotton and man-made fiber pajamas and other nightwear (Category 351/651) from Thailand reached 57,777 dozen during the year

ending January 1990, more than 47 times the 1,212 dozen imported a year earlier. During 1989, imports of Category 351/651 from Thailand reached 39,776 dozen compared to 1,912 dozen imported during 1988. In the month of January 1990, Category 351/651 imports from Thailand were 18,001 dozen, 45 percent of Thailand's total calendar year 1989 level.

The sharp and substantial increase in Category 351/651 imports from Thailand is causing disruption in the U.S. market for men's and boy's and women's and girls' cotton and man-made fiber pajamas and other nightwear.

U.S. Production and Market Share

U.S. production of men's and boys' and women's and girls' cotton and man-made fiber pajamas and other nightwear (Category 351/651) declined from 19,244,000 dozen in 1987 to 18,453,000 dozen in 1988, a decline of 4 percent. During the first nine months of 1989, production of Category 351/651 dropped to 11,764,000 dozen, 18 percent below the 14,320,000 dozen produced in the same period of 1988. The domestic manufacturers' share of the men's and boys' and women's and girls' cotton and man-made fiber pajamas and other nightwear market dropped from 78 percent in 1987 to 76 percent in 1988. The domestic manufacturers' share dropped another 7 percentage points, to 69 percent, during the first nine months of 1989.

U.S. Imports and Import Penetration

U.S. imports of men's and boys' and women's and girls' cotton and man-made fiber pajamas and other nightwear (Category 351/651) reached 7,502,000 dozen during the year ending January 1990, 30 percent above the 5,773,000 dozen imported a year earlier. U.S. imports of Category 351/651 increased from 5,360,000 dozen in 1987 to 7,277,000 dozen in 1989, a 36 percent increase. The ratio of imports to domestic production increased 3 percentage points in 1988, increasing from 28 percent in 1987 to 31 percent in 1988. The ratio increased another 14 percentage points in the first nine months of 1989, reaching 45 percent.

Duty-Paid Value and U.S. Producers' Price

Approximately 83 percent of Category 351/651 imports from Thailand during 1989 entered under HTSUSA number 6108.31.0010—women's cotton knit nightdresses and pajamas. These garments entered the U.S. at landed duty-paid values below U.S. producers' prices for comparable garments.

Thailand—Market Statement for Cotton Sheets—Category 361

March 1990.

Import Situation and Conclusion

U.S. imports of cotton sheets—Cetegory 361 from Thailand reached 482 thousand units in the year ending January 1990, 60 times the 8 thousand units imported in the year ending January 1989. In calendar year 1989, imports of Category 361 from Thailand reached 378 thousand units compared to 8 thousand units imported during 1988. In the month of January 1990, Category 361 imports from Thailand were 104 thousand units, 28 percent of Thailand's total calendar year 1989 level.

The sharp and substantial increase of Category 361 imports from Thailand is disrupting the U.S. market for cotton sheets.

Import Penetration and Market Share

Between 1986 and 1988, U.S. cotton sheet producers began to regain market share lost to imports as production increased. However, in the first half of 1989, U.S. production dropped 11 percent while imports increased 3 percent over the same period in 1988. U.S. imports of Category 361 by the end of 1989 surged to a record 17,957 thousand units, 40 percent above the calendar year 1988 level of 12,849 thousand units.

The U.S. producers' share of the cotton sheet market dropped 3 percentage points during the first half of 1989, falling from 76 percent in the first half of 1988 to 73 percent in the same period in 1989. The ratio of imports to domestic production increased from 31 percent during January–June of 1988 to 36 percent during this same period in 1989. Annualizing January–June 1989 production data and using calendar year 1989 imports results in a domestic market share for 1989 of 66 percent and a 1989 import to production ratio of 52 percent.

Duty Paid Value and U.S. Producers' Price

Approximately 76 percent of Category 361 cotton sheet imports from Thailand during 1989 entered under HTSUSA number 6302.21.2040—cotton sheets printed not napped other than trimmed, etc. These sheets are being entered at duty-paid landed values well below U.S. producers' prices for comparable sheets.

[FR Doc. 90-9181 Filed 4-19-90; 8:45 am]
BILLING CODE 3510-DR-M

COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

Procurement List 1990; Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Additions to procurement list.

SUMMARY: This action adds to procurement List 1990 commodities to be produced and services to be provided by workshops for the blind or other severely handicapped.

EFFECTIVE DATE: May 21, 1990.

ADDRESSES: Committee for Purchase form the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 557–1145.

SUPPLEMENTARY INFORMATION: On February 16 and 23, March 2 and 9, 1990, the Committee for Purchase from the Blind and Other Severely Handicapped published notices (55 FR 5646, 6415, 7526 and 8975) of proposed additions to Procurement List 1990, which was published on November 3, 1989 (54 FR 46540).

After consideration of the material presented to it concerning capability of qualified workshops to produce the commodities and provide the services at a fair market price and impact of the addition on the current or most recent contractors, the Committee has determined that the commodities and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.6.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

a. The actions will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The actions will not have a serious economic impact on any contractors for the commodities and services listed.

c. The actions will result in authorizing small entities to produce the commodities and provide the services procured by the Government.

Accordingly, the following commodities and services are hereby added to Procurement List 1990:

Commodities

Kit, Backpack
1375–01–204–1930

Trailer, Backpack
75–01–254–7721
Bag, Plastic
8105–00–NIB–0011—16"W×18"L
8105–00–NIB–0012—24"W×24"L
8105–00–NIB–0013—24"W×40"L
8105–00–NIB–0014—36"W×48"L
8105–00–NIB–0015—9"W×12"L
(Requirements of Naval Supply Center, Puget Sound, Bremerton, Washington only)

Services

Commissary Shelf Stocking & Custodial
Fort Wainwright, Alaska
Corrosion Control of Fuel Pipelines
Manchester Naval Fuel Department
Manchester, Washington
Grounds Maintenance
Rogue River National Forest
J. Herbert Stone Nursery
2606 Old Stage Road
Central Point, Oregon
Janitorial/Custodial
Federal Building and U.S. Post Office
Idabel, Oklahoma

Beverly L. Milkman,
Executive Director.

[FR Doc. 90–9236 Filed 4–19–90; 8:45 am]
BILLING CODE 6820–33–M

Procurement List 1990; Addition

AGENCY: Committee for Purchase From the Blind and Other Severely Handicapped.

ACTION: Addition to procurement list.

SUMMARY: This action adds to Procurement List 1990 a service to be provided by workshops for the blind or other severely handicapped.

EFFECTIVE DATE: May 21, 1990.

ADDRESSES: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 557–1145.

SUPPLEMENTARY INFORMATION: On November 17, 1989, the Committee for Purchase from the Blind and Other Severely Handicapped published notice (54 FR 48789) of proposed additions to Procurement List 1990, which was published on November 3, 1989 (54 FR 46540).

Comments were received from the current contractor prior to the issuance of the notice of proposed addition of this service to the Procurement List, and during the comment period from the National Union representing that contractor's employees. The current contractor indicated that the addition of this service when combined with another janitorial service already on the Procurement List would be "a devastating blow" to his firm from a dollar volume and number of contracts standpoint. The Union commenter expressed concern that the employees who may be displaced if this service is added to the Procurement List would be unable to obtain other employment at comparable wages and benefits.

The Committee recognizes that some impacts of this nature are a necessary consequence of its operations, and carefully considers the overall impact of each of its actions. The Committee, in accordance with its regulations, has considered the comulative impact on the current contractor resulting from the addition of this and a previous service to the JWOD Program and has determined that the additions would not constitute severe adverse impact on the contractor.

The Committee also considered concerns expressed in the comments about the loss of employment and the possible inability of the displaced employees to obtain other employment at comparable wages and benefits in arriving at its decision to add this service to the Procurement List. The Committee has determined that the employment gains for persons with profound disabilities who have difficulty in finding a job at any wage outweigh the possible loss of employment by persons who do not have severe disabilities.

After consideration of the material presented to it concerning the capability of a qualified workshop to provide this service at a fair market price and the impact of the addition on the current or most recent contractor, the Committee has determined that the service listed below is suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.6. I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

a. The action will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The action will not have a serious economic impact on any contractors for the service listed.

c. The action will result in authorizing small entities to provide the service procured by the Government.

Accordingly, the following service is hereby added to Procurement List 1990:

Janitorial/Custodial
Lafayette Building
811 Vermont Avenue NW.,
Washington, DC

Beverly L. Milkman,
Executive Director.

[FR Doc. 90–9237 Filed 4–19–90; 8:45 am]
BILLING CODE 6820–33–M

Procurement List 1990; Proposed Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee has received proposals to add to Procurement List 1990 commodities to be produced and services to be provided by workshops for the blind or other severely handicapped.

COMMENTS MUST BE RECEIVED ON OR BEFORE: May 21, 1990.

ADDRESSES: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, Suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 557–1145.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.6. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government will be required to procure the commodities and services listed below from workshops for the blind or other severely handicapped.

It is proposed to add the following commodities and services to Procurement List 1990, which was published on November 3, 1989 (54 FR 46540):

Commodities

Strap, Webbing
2540–00–715–3854
2540–00–894–9542
Strap, Webbing
5340–01–105–1002
5340–01–110–4298

Services

File Maintenance
Department of Commerce
U.S. Patent and Trademark Office
Arlington, Virginia
Grounds Maintenance
U.S. Army Reserve Center
900 Cache Road

Lawton, Oklahoma
Janitorial/Custodial
U.S. Army Reserve Center
900 Cache Road
Lawton, Oklahoma
Janitorial/Grounds Maintenance
U.S. Army Reserve Center
College and Reserve Avenue
Hot Springs, Arkansas

Beverly L. Milkman,
Executive Director.
[FR Doc. 90-9238 Filed 4-19-90; 8:45 am]
BILLING CODE 6820-33-M

DEPARTMENT OF THE DEFENSE

Corps of Engineers, Department of the Army

Federal Manual for Identifying and Delineating Jurisdictional Wetlands; Public Meeting

AGENCY: U.S. Army Corps of Engineers, Department of Defense.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda for a forthcoming meeting concerning the *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (Manual). The purpose of this meeting is to afford the public the opportunity to comment on the technical aspects of wetlands delineation as described in the Manual.

DATES/TIMES: May 5, 1990, 9 a.m.–6 p.m.
Location: Louisiana State University, LSU Union Building, Cotillion Ball Room, Baton Rouge, Louisiana.

FOR FURTHER INFORMATION CONTACT: Michael Davis, Regulatory Branch (CECW-OR), U.S. Army Corps of Engineers, 20 Massachusetts Ave., NW., Washington, DC 20314-1000, (202) 272-8548 or 272-0201; Bill Sipple, U.S. Environmental Protection Agency, A104-F, 401 M Street, SW., Washington, DC 20460, (202) 382-5066; Gary Frazer, U.S. Fish and Wildlife Service, ARLSQ MS400, 18th and C Street, NW., Washington, DC 20240, (703) 358-2183; or Billy Teels, U.S. Soil Conservation Service, P.O. Box 2890, Washington, DC 20013, (202) 447-5991.

Agenda: The session will consist of a public meeting, with comments received from State Governors, Members of Congress, state and local officials, the general public, industry representatives and the environmental community. Elected officials will be given the first opportunity to speak. This part of the meeting will start at 9 a.m. and is expected to end no later than 12 noon. The session will adjourn from 12 noon to 1 p.m. for lunch. Following the elected officials, comments from the general public, industry representatives and the environmental community will be received until 6 p.m. Because of the large number of speakers anticipated, oral comments must be limited to five minutes. However, individuals may submit additional comments in writing the day of the meeting for inclusion in the official record. Each person wishing to make an oral statement will be asked to complete a speakers card as they enter the Cotillion Ball Room.

SUPPLEMENTARY INFORMATION: At the Federal level, four agencies are principally involved with identification and delineation of jurisdictional wetlands. These agencies are the Army Corps of Engineers (Corps), the Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), and the Soil Conservation Service (SCS). Each of the agencies developed, over the years, their own techniques for identifying and delineating wetlands. Recognizing the inefficiency and increased regulatory burden on the public caused by these differing agency approaches, the four agencies initiated discussions on the possibility of merging the four Federal methods into a joint interagency wetland delineation manual. In May 1988, the first of several interagency meetings was held to discuss the differences between each agency's approach to delineating wetlands. This interagency committee reached agreement and on January 10, 1989, the Corps, FWS, EPA and SCS adopted the Manual as the recommended method for identifying and delineating jurisdictional wetlands in the United States. The manual was implemented by the Corps, FWS and EPA on 20 March 1989. The Manual describes the technical criteria, field indicators, and other sources of information necessary for each agency to make consistent wetlands delineations.

Now that the Manual has been in use for a full year, the interagency committee has initiated discussions on the need for clarification and/or technical changes. This evaluation should be completed by October 1990. Part of this review will include an evaluation of technical comments obtained from the proposed public meeting. In this regard, statements at the meeting will be recorded.

It is important to understand that the purpose of this meeting is to obtain comments on the technical aspects of the Manual. This meeting is not for the purpose of discussing broader policy issues such as "no net loss" of wetlands. The President's Domestic Policy Council Interagency Task Force on Wetlands will be holding public meetings to discuss policy issues related to wetlands later on this year.

Dated: April 16, 1990.

Wilbur T. Gregory Jr.,
Colonel, U.S. Army, Executive Director of Civil Works.
[FR Doc. 90-9172 Filed 4-19-90; 8:45 am]
BILLING CODE 3710-92-M

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: National Assessment Governing Board, Department of Education.

ACTION: Notice of partially closed meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act.

DATES: May 11–20, 1990.

TIMES: May 11, 1990, 8:30 am., until 4 p.m. open; May 11, 1990, 4 p.m. until adjournment, closed; May 12, 1990, 8:30 a.m. until adjournment, approximately 2 p.m., open.

LOCATION: Hotel Washington, 15th and Pennsylvania Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Roy Truby, Executive Director, National Assessment Governing Board, U.S. Department of Education, Suite 7322, 1100 L Street NW., Washington, DC 20005-4013, Telephone: (202) 357-6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 406(i) of the General Education Provisions Act (GEPA) as amended by section 3403 of the National Assessment of Educational Progress Improvement Act (NAEP Improvement Act), Title III-C of the Augustus F. Hawkins—Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. 100-297); (20 USC 1221e-1).

The Board is established to advise the Commissioner for Education Statistics on policies and actions needed to improve the form and use of the National Assessment of Educational Progress, and develop specifications for the design, methodology, analysis and reporting of test results. The Board also is responsible for selecting subject areas

to be assessed, identifying the objectives for each age and grade tested, and establishing standards and procedures for interstate and national comparisons.

The National Assessment Governing Board will meet in Washington, DC, on May 11–12, 1990 from 8:30 a.m. until the completion of business on both days. On May 11, 1990, the meeting will be open to the public from 8:30 a.m. until 4:00 p.m. Beginning at 4 p.m. and ending at approximately 6:00 p.m., the Board will meet in closed session. On May 12, 1990, the Board will reconvene in open session from 8:30 a.m. until adjournment which is expected to be at approximately 2 p.m. During the open portions of the meeting, the Board will discuss (1) proposals for setting achievement goals for the NAEP; (2) plans for reducing NAEP timelines; and (3) reports by the respective committees on the reading and writing objectives.

On May 11, 1990, from 4 p.m. until adjournment, the meeting will be closed to the public under the authority of 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. appendix 2) and under exemptions (2) and (6) of 5 U.S.C. 552b(c), the Government in the Sunshine Act (Pub. L. 94–409, 5 U.S.C. 552b). During the closed portion of the meeting, the members will review the qualifications of those on the list of nominees to determine the best-qualified candidates to be proposed for Board membership. Discussions during the closed portion will touch upon matters that would disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy if conducted in open session and will relate solely to the internal personnel rules and practices of an agency. Such matters are protected under exemptions (2) and (6) of 5 U.S.C. 552b(c). On May 12, the Board will continue discussing agenda items from the previous day.

A summary of the activities at the closed session and related matters, which are informative to the public consistent with the policy of 5 U.S.C. 552b, will be available to the public within fourteen days after the meeting.

Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, 1100 L Street NW., Suite 7322, Washington, DC., from 8:30 a.m. to 5 p.m.

Christopher T. Cross,

Assistant Secretary for Educational Research and Improvement.

[FR Doc. 90–9210 Filed 4–19–90; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Office of Fossil Energy

[FE Docket No. 90–14–NG]

LEDCO Inc.; Application for Blanket Authorization To Import and Export Natural Gas to and From Canada

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of application for blanket authorization to import and export natural gas to and from Canada.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt on March 6, 1990, of an application filed by LEDCO Inc. (LEDCO) for blanket authorization to import up to 175 Bcf, and to export up to 175 Bcf, of natural gas, including liquefied natural gas (LNG), over separate two-year periods beginning on the date of first import or export. LEDCO now holds blanket authority to import up to 365 Bcf of Canadian natural gas over a two year period through May 22, 1990. LEDCO intends to utilize existing pipeline and LNG facilities for the processing and transportation of the volumes to be imported or exported and to submit quarterly reports detailing each transaction.

The application is filed under section 3 of the Natural Gas Act and DOE Delegation Order Nos. 0204–111 and 0204–127. Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures and written comments are to be filed at the address listed below no later than 4:30 p.m., e.d.t., _____, May 21, 1990.

ADDRESSES: Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, room 3F–056, FE–50, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION:

Larine A. Moore, Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, room 3F–056, FE–53, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478.

Diane Stubbs, Natural Gas and Mineral Leasing, Office of General Counsel, U.S. Department of Energy, Forrestal Building, room 6E–042, GC–32, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–6667.

SUPPLEMENTARY INFORMATION: LEDCO, a Louisiana corporation with its principal place of business in Houston, Texas, is a marketer of natural gas.

LEDCO's existing two-year import authorization was granted in DOE/ERA Opinion and Order No. 225, (Order 225) (1 ERA 70,757), issued February 11, 1988, in ERA Docket No. 87–59–NG. First delivery of imported gas began on May 22, 1988. LEDCO's prior quarterly reports filed with FE indicate that approximately 13,764 MMcf of natural gas were imported under Order 225 through December 1989.

LEDCO requests authority to import natural gas for short-term sales for its own account as well as for the accounts of others. LEDCO states that the imported gas would make alternative supplies of gas available to a wide range of markets in the United States, including pipelines, local distribution companies and commercial and industrial end-users. In regard to its request for the export authority, LEDCO proposes to export natural gas obtained from fields in various gas producing states or, via the import/export transactions involving non-domestic supplies. LEDCO would import and export natural gas and LNG both for its own account as well as for the account of others.

LEDCO currently is negotiating arrangements to export natural gas to Canada, but is requesting the flexibility to enter into agreements for the importation and exportation of natural gas and LNG with other unspecified but similarly situated countries. The specific terms of each import and export arrangement would be negotiated on an individual basis at market responsive prices.

LEDCO requests that an authorization be granted on an expedited basis. Except in emergency circumstances, 10 CFR 590.205(a) of FE's administrative procedures provides for a public comment period of not less than 30 days. LEDCO does not identify any emergency circumstances that would justify expedited consideration. Accordingly, a decision on the application will not be made until all responses to this notice have been received and evaluated.

The decision on the application for import authority will be made consistent with the DOE's gas import policy guidelines, under which the competitiveness of an import arrangement in the markets served is the primary consideration in determining whether it is in the public interest (49 FR 6684, February 22, 1984). In reviewing natural gas export applications, the domestic need for the gas to be exported is considered, and any other issues determined to be appropriate in a particular case, including whether the arrangement is consistent with the DOE

policy of promoting competition in the natural gas marketplace by allowing commerical parties to freely negotiate their own trade arrangements. Parties that may oppose this application should comment in their responses on these regulatory and policy considerations. The applicant asserts that the proposed imports will make competitively priced gas available to U.S. markets while the short-term nature of the transactions will minimize the potential for undue long-term dependence on foreign sources of energy. LEDCO also asserts that the proposed export volumes would result in a reduction of the current excess domestic natural gas supply, generate income and tax revenues, and reduce the U.S. trade deficit. Parties opposing the arrangement bear the burden of overcoming these assertions.

NEPA Compliance: The National Environmental Policy Act (NEPA), 42 U.S.C. (4321, *et seq.*) requires the DOE to give appropriate consideration to the environmental effects of its proposed actions. No final decision will be issued in this proceeding until the DOE has met its NEPA responsibilities.

Public Comment Procedures: In response to this notice, any person may file a protest, motion to intervene or notice of intervention, as applicable, and written comments. Any person wishing to become a party to the proceeding and to have the written comments considered as the basis for any decision on the application must, however, file a motion to intervene or notice of intervention as applicable. The filing of a protest with respect to this application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements that are specified by the regulations in 10 CFR part 590. Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Office of Fuels Programs at the above address.

It is intended that a decisional record will be developed on the application through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should indentify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final opinion and order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

A copy of LEDCO's application is available for inspection and copying in the Office of Fuels Programs Docket room, 3F–056 at the above address. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued In Washington, DC, April 11, 1990.

Clifford P. Tomaszewski,

Director, Office of Natural Gas, Office of Fuels Programs, Office of Fossil Energy.

[FR Doc. 90–9224 Filed 4–19–90; 8:45 am]

BILLING CODE 6450-01-M

[ERA Docket No. 90–09–NG]

New England Power Co.; Application To Import Natural Gas From Canada

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of application for long-term authorization to import natural gas from Canada.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application filed on February 9, 1990, and supplemented on February 23, 1990, by New England Power Company (New England Power) for authorization to import on a firm basis up to 60,000 Mcf per day of natural gas from Canada over a period of 15 years that would begin on November 1, 1991. The imported gas would be used to fuel New England Power's Brayton Point electric generating plant in Somerset, Massachusetts and its Manchester Street plant in Providence, Rhode Island. Both existing and proposed pipeline facilities would be used for delivering this gas from the international border near Iroquois, Ontario/Waddington, New York through New York, Massachusetts, and Rhode Island to the generator plants.

The application is filed pursuant to section 3 of the Natural Gas Act and DOE Delegation Order Nos. 0204–111 and 0204–127. Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene, notices of intervention, requests for additional procedures and written comments are to be filed at the address listed below no later than 4:30 p.m., e.d.t., May 21, 1990.

ADDRESSES: Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, room 3F–056, FE–50, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

P.J. Fleming, Office of Fuels Programs, Fossil Energy, U.S. Department of Energy, Forrestal Building, room 3F–094, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–4819

Diane Stubbs, Natural Gas and Mineral Leasing, Office of General Counsel, U.S. Department of Energy, Forrestal Building, room 6E–042, Washington, DC 20585, (202) 586–6667

SUPPLEMENTARY INFORMATION: The applicant, a Massachusetts corporation with its headquarters in Westborough, Massachusetts, is engaged in the generation and transmission of electric power for sale at wholesale to affiliated and unaffiliated utilities in the New England region. New England Power is proposing to overhaul its existing four-unit Brayton Point generating station in Somerset, Massachusetts to reduce the sulfur dioxide emissions. Brayton Point Unit No. 4, a 430-megawatt (MW) oil-fired unit, would be modified to add natural gas burning capability. Unit No. 4 is expected to consume about 95,000 Mcf per day and is scheduled to start running on gas in November 1991.

New England Power is also proposing to repower the Manchester Street facility in Providence, Rhode Island, to convert the unit to a combined cycle station fired by firm gas supplies, with the ability to use No. 2 oil as emergency backup. This power plant relies on residual oil, using interruptible supplies of gas when available. The installation of gas-fired combustion turbines and heat recovery steam generators at the Manchester Street plant would increase its output from 150 MW to 450 MW. This

project would burn from 75,000 to 80,000 Mcf of gas on an average daily basis and is not expected to be in service before November 1994.

New England Power intends to self-certify to the DOE, pursuant to the Powerplant and Industrial Fuel Use Act of 1978 (FUA), as amended (54 FR 52886, December 22, 1989), that the added new machinery at the Manchester Street plant would be capable of using coal or another alternate fuel as a primary energy source. Brayton Point Unit No. 4 was designed as a residual oil burning unit and has never been coal-capable. It is not subject to the FUA.

The 60,000 Mcf per day of Canadian gas that New England Power proposes to import and receive at the power plants would be purchased in Canada from four producers: BP Resources Canada Limited (BP Canada) (10,000 Mcf/d), Renaissance Energy Limited (Renaissance) (15,000 Mcf/d), Sceptre Resources Limited (Sceptre) (20,000 Mcf/d), and Triton Canada Resources Limited (Triton) (15,000 Mcf/d). The contract prices that New England Power would pay for the gas are set in the field, except in the Renaissance contract, where the price is determined at Empress, Alberta. Generally, all pipeline transportation costs would be billed directly to New England Power. In the Renaissance contract, however, New England Power would compensate Renaissance for the cost to transport the gas to the Alberta/Saskachewan border near Empress by paying a higher base price.

The prices under the four contracts are adjusted in accordance with pricing mechanisms directly tied to fossil fuel indices. Although natural gas is the primary component of the index in every case, some contain oil or coal components, and all are designed to allow the price of the gas to track monthly changes in New England Power's total fossil fuel supply costs. New England Power expects that the indices will yield contract prices that reflect the market price of natural gas. However, if a significant divergence exists, the parties may elect to renegotiate the prices. Each of the four contracts contains a provision that permits reopening of the price every two years. Applicant's contracts with BP Canada, Sceptre, and Triton have 20-year terms; the Renaissance contract extends for a primary term of 15 years with an optional five-year extension.

According to New England Power, if the gas were flowing on January 1, 1990, the total delivered cost of the imports at the international border would have been $2.43/MMBtu (BP Canada), $2.24/MMBtu (Renaissance and Sceptre), and $2.15/MMBtu (Triton). This equates to a weighted average import price of $2.25/MMBtu at a 100 percent load factor.

The following summarizes the principal provisions in New England Power's purchase agreements with the Canadian producers.

A. BP Canada

The initial base price is $1.33 per MMBtu, adjusted monthly by an index comprised of: (1) Tennessee Gas Pipeline Company's (Tennessee) cost of gas in Louisiana and offshore, (2) ANR Pipeline Company's cost of gas in Oklahoma, and (3) the average cost of oil purchased by New England Power for its power plants. The contract price may be reopened every two years if the price does not allow New England Power's gas-fired plants to operate as base-load units or if the price diverges from the market price paid for gas as measured by the Average Alberta Market Price (AAMP) published by the Government of Alberta. The contract has an 80 percent minimum annual take provision. If New England Power fails to take the minimum amount of gas, BP Canada can charge a reservation fee or reduce the daily contract quantity.

B. Renaissance

The initial base price is $1.37 per MMBtu, adjusted monthly by an index comprised of: (I) Tennessee's weighted average cost of gas (WACOG), (2) Texas Eastern Transmission Corporation's WACOG, and (3) New England Power's average cost of oil and coal reported in its Federal Energy Regulatory Commission (FERC) Form 423 for such month. The contract price may be reopened by either party every two years. There is an 80 percent minimum annual take provision. The amount of gas that Renaissance is obligated to supply (MDQ) is subject to reduction if New England Power fails to take the minimum volumes. If deficiencies occur in any two consecutive contract years and the MDQ in the second year has been reduced, Renaissance would have the right to terminate the contract.

C. Sceptre

The price each month is the sum of: (1) One-half the AAMP for such month, (2) one-half of the difference between New England Power's weighted average reported fossil fuel commodity costs for such month, and (3) a variable amount expressed in dollars per MMBtu (the "Dispatch Factor") based on New England Power's expenses of operating its power plants. The contract price may be reopened every two years if the price does not allow New England Power's gas-fired plants to operate as base-load units or if the price diverges from the market price paid for gas as measured by the AAMP. There is a 65 percent minimum annual take provision. If the minimum amount of gas is not taken, New England Power may pay a reservation fee or allow Sceptre to reduce the daily contract quantity.

D. Triton

The price each month is the sum of: (1) 85 percent of the AAMP and (2) an amount equal to 50 percent of the levy imposed on the gas by the Alberta Petroleum Marketing Commission pursuant to the Take-or-Pay Cost Sharing Act of Alberta. The contract price may be reopened every two years if the price does not allow New England Power's power plants to operate as base-load units or if the price does not reflect prices being paid for Alberta gas used for generating electricity in New England. There is a 65 percent minimum annual take provision. If the minimum amount of gas is not taken, New England Power may pay a reservation fee or allow Triton to reduce the daily contract quantity.

The gas would be imported through a proposed new border interconnection between Iroquois Gas Transmission System (Iroquois) and TransCanada PipeLines Limited, with further downstream transportation to the generator plants by Tennessee and Algonquin Gas Transmission Company (Algonquin). The FERC has the lead in preparing an Environmental Impact Statement (EIS) assessing the impacts of constructing the new interconnection (FERC Docket Nos. CP89-634-000, *et al.* and CP89-815000) and the additional facilities proposed by Tennessee (Docket No. CP89-629-000) and Algonquin (CP89 661-000) to provide transportation of this gas. A draft EIS (DEIS) encompassing the pipeline construction proposed by Iroquois and Tennessee was issued in November 1989 (FERC/EIS 00554D) (54 FR 48020, November 20, 1989). The environmental impact of Algonquin's proposed facilities is evaluated in a separate DEIS prepared for the Champlain Pipeline Project (FERC/EIS 0055D) (54 FR 47816, November 17, 1989) that was issued concurrently with the Iroquois/Tennessee Pipeline Project DEIS. The final analysis of the Algonquin facilities will appear in the final EIS for the Iroquois/Tennessee Pipeline Project. An environmental review of New England Power's power plant modifications is included in the Champlain Pipeline Project DEIS.

In support of its application, New England Power asserts that additional

firm gas supplies as an alternative to oil would enhance the security of the New England region's fuel supply. Moreover, adding gas burning capability to the Brayton Point facility would help achieve compliance with the Massachusetts Acid Rain Law that requires sizable reductions in sulphur dioxide emissions.

The decision on New England Power's application for import authority will be made consistent with the DOE's gas import policy guidelines, under which the competitiveness of an import arrangement in the markets served is the primary consideration in determining whether it is in the public interest (49 FR 6684, February 22, 1984). Other matters that may be considered in making a public interest determination include need for gas and security of the long-term supply. Parties that may oppose this application should comment in their responses on the issues of competitiveness, need for the gas, and security of supply as set forth in the policy guidelines. The applicant asserts that this import arrangement is in the public interest because the volumes are needed to fuel its electric generating facilities, the price of the gas would be competitive, and its Canadian suppliers are reliable. Parties opposing the import arrangement bear the burden of overcoming these assertions.

NEPA Compliance

The National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) requires the DOE to give appropriate consideration to the environmental effects of its proposed actions. The FERC is currently performing an environmental review of the impacts of constructing and operating the proposed facilities related to this project. The DOE will independently review the results of the FERC environmental evaluation in the course of making its own environmental determination. No final decision will be issued in this proceeding until the DOE has met its NEPA responsibilities.

Public Comment Procedures

In response to this notice, any person may file a protest, motion to intervene or notice of intervention, as applicable, and written comments. Any person wishing to become a party to the proceeding and to have the written comments considered as the basis for any decision on the application must, however, file a motion to intervene or notice of intervention, as applicable. The filing of a protest with respect to this application will not serve to make the protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the application. All protests, motions to intervene, notices of intervention, and written comments must meet the requirements that are specified by the regulations in 10 CFR part 590.

Protests, motions to intervene, notices of intervention, requests for additional procedures, and written comments should be filed with the Office of Fuels Programs at the above address.

It is intended that a decisional record will be developed on the application through responses to this notice by parties, including the parties, written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinly in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disolosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final opinion and order may be issued based on the official record, including the application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

A copy of New England Power's application is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F-056 at the above address. The docket room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, April, 12, 1990.

Constance L. Buckley,

Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 90-9132 Filed 4-19-90; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket No. GP88-11-002]

Hadsen Gas Systems, Inc.; Survey of Interstate Transportation Activity Pursuant to the Authority of Section 311 of the NGPA; Agency Information Collection Under OMB Review

Issued April 18, 1990.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of request for emergency OMB review of data request.

SUMMARY: Pursuant to §§ 1320.15 and 1320.18 of OMB's regulations, the Federal Energy Regulatory Commission (Commission) is submitting to OMB a request for emergency and expedited review of an information collection survey of NGPA section 311 transportation activity by interstate pipelines that are subject to the Commission's jurisdiction. The Commission is requesting OMB clearance of the data request by no later than 5 p.m., Thursday, April 19, 1990. The data request is scheduled to be mailed to the pipelines on Friday, April 20, 1990.

FOR FURTHER INFORMATION CONTACT: Mr. William E. Murrell, Office of Pipeline and Producer Regulation Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, Phone: (202) 208-1109.

SUPPLEMENTARY INFORMATION: Pursuant to §§ 1320.15 and 1320.18 of OMB's regulations, the Federal Energy Regulatory Commission (Commission) is seeking emergency OMB approval of a data request surveying NGPA section 311 transportation activity by interstate pipelines. The title of the data request is "Survey of Interstate Transportation Activity Pursuant to the Authority of Section 311 of the NGPA." The Commission needs this information in order to respond in a timely fashion to the U.S. Court of Appeals for the D.C. Circuit's remand in *Associated Gas Distributors, et al.* v. *FERC*, No. 88-1856, issued on April 6, 1990. The court remanded to the Commission the question of the appropriate definition of the phrase "on behalf of" as that phrase is used to determine the eligibility for transportation services authorized pursuant to the Commission's regulations implementing section 311(a)(1) of the NGPA. The respondents are the 59 interstate pipelines subject to the Commission's jurisdiction. The total reporting and recordkeeping burden that

will result from the collection of information is estimated to average 80 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Mr. Mike Miller, Federal Energy Regulatory Commission, Information Policy and Standards Branch, 825 N. Capitol Street NE., Washington, DC; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Federal Energy Regulatory Commission, Washington, DC 20503.

A copy of the data request is attached to the this notice as Appendix A.

Lois D. Cashell,

Secretary.

Form Approved
OMB No. 1902–
Expiration Date:

Reference: Docket No. GP88–11–002, Survey of Interstate Transportation Activity Pursuant to the Authority of Section 311 of the NGPA (FERC–594)

Ladies and Gentlemen:

On April 6, 1990, the U.S. Court of Appeals for the D.C. Circuit issued *Associated Gas Distributors, et al., v. FERC*, No. 88–1856. In assessing what action to take, if any, in light of that opinion, the Commission staff requires certain information from the interstate pipelines concerning several NGPA section 311 authorizations undertaken pursuant to the Commission's regulations. Accordingly, please provide the following information.

1. The number of NGPA section 311(a)(1) transactions underway, whether firm or interruptible, their 1989 annual volumes, their scheduled durations, the volume percentage they represent as a function of total 1989 transportation (both Part 284 and Section 7) and total 1989 throughput.

2. For each of the transactions in item 1, please identify the "on behalf of" entity, and describe the nature of the relationship between the "on behalf of" entity and the transaction.

3. Please identify, by individual project, the total number of miles, compressor horsepower and dollar value of related facilities (a) constructed and (b) being constructed pursuant to section 284.3(c) of the Commission's regulations. In addition, please identify separately the extent to which transportation through such facilities has been included as part of the information requested in items 1 and 2 above.

4. The number of NGPA section 311(a)(1) transactions underway on April 6, 1990, which have subsequently been performed or are intended to be performed under blanket certificate authority, whether firm or interruptible, their 1989 annual volumes, their scheduled durations, the volume percentage they represent as a function of total 1989 transportation and total 1989 throughput.

Please respond by May 9, 1990. All responses should reference Docket No. GP88–11–002 and should be filed under oath by an authorized representative of the pipeline, including the name, position and telephone number of the respondent to each question. An original and one copy of the response should be filed with the Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426.

Sincerely,

Kevin P. Madden,

Director, Office of Pipeline and Producer Regulation.

Information Collection Statement

Public reporting burden for this collection of information is estimated to average 80 hours per response, including the time of reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Federal Energy Regulatory Commission, Office of Information Resources Management, room 3400H, 941 North Capitol Street, NE., Washington, DC 20426; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

[FR Doc. 90–9355 Filed 4–19–90; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. QF90–124–000]

City of LeClaire, IA; Application for Commission Certification of Qualifying Status of a Small Power Production Facility

April 13, 1990.

On April 2, 1990, the City of LeClaire, Iowa (Applicant), of 425 North 3rd Street, LeClaire, Iowa 52753, submitted for filing an application for certification of a facility as a qualifying small power production facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The proposed 27 MW hydroelectric facility will be located on the river side of Smith's Island on the Mississippi River at 493.9 miles above the confluence of the Ohio and Mississippi Rivers.

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE, Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

A separate application is required for a hydroelectric project license, preliminary permit or exemption from licensing. Comments on such applications are requested by separate public notice. Qualifying status serves only to establish eligibility for benefits provided by PURPA, as implemented by the Commission's regulations, 18 CFR part 292. It does not relieve a facility of any other requirements of local, State or Federal law, including those regarding siting, construction, operation, licensing and pollution abatement.

Lois D. Cashell,

Secretary.

[FR Doc. 90–9140 Filed 4–19–90; 8:45 am]

BILLING CODE 6717–01–M

[Project No. 2392–004, Vermont; New Hampshire]

Availability of Environmental Assessment; Georgia Pacific Corp.

April 12, 1990.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Hydropower Licensing has reviewed the application for major license for the proposed Gilman Hydroelectric Project located on the Connecticut River in Essex County, Vermont and Coos County, New Hampshire, near Lunenburg, Vermont and Dalton, New Hampshire, and has prepared an Environmental Assessment (EA) for the proposed project. In the EA, the Commission's staff has analyzed the potential environmental impacts of the proposed project and has concluded that approval of the proposed project, with appropriate mitigative measures, would not constitute a major federal action

significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Public Reference Branch, room 1000, of the Commission's offices at 825 North Capitol Street, NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 90-9141 Filed 4-19-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ90-2-23-001]

Proposed Changes in FERC Gas Tariff; Eastern Shore Natural Gas Co.

April 13, 1990.

Take notice that Eastern Shore Natural Gas Company (ESNG) tendered for filing on April 9, 1990 certain revised tariff sheets included in appendix A attached to the filing. Such sheets are proposed to be effective May 1, 1990.

ESNG states that such tariff sheets are from its quarterly PGA filing pursuant to § 154.308 of the Commission's regulations and section 21 of its FERC Gas Tariff, Original Volume No. 1. Tariff sheets Substitute 53rd Revised Sheet No. 5 and Substitute 53rd Revised Sheet No. 11 are being refiled to correct for a tracking error in the GSS-1 Demand Charge rate in the original filing dated March 30, 1990. Also being refiled is a revised Schedule G2 to correct for an improperly stated Amortizing and Current Deferral Subaccount Balances and adds demand costs to the Total Projected Quarterly Costs.

ESNG states that copies of the filing have been served upon its jurisdicitonal customers and interested State Commissions.

Any person desiring to be heard or protest said filing should file a motion to intervene with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 and Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before April 20, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are avaiable for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-9142 Filed 4-19-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM90-4-53-000]

Compliance and Tracking Filing; K N Energy, Inc.

April 13, 1990.

Take notice that K N Energy, Inc. ("K N") on April 10, 1990, tendered for filing the following tariff sheets to revise its FERC Gas Tariff, Original Volume No. 1-B:

First Revised Sheet No. 45
First Revised Sheet No. 48
First Revised Sheet No. 49
Original Sheet No. 50
Original Sheet No. 51

K N states that the above-referenced tariff sheets are being filed in compliance with the Commission's Order issued in Docket No. RP89-209 and that the filing reflects revisions to conform with revisions to the tariff of Colorado Interstate Gas Company ("CIG") which were approved by the Commission on March 12, 1990, by an order issued in Docket Nos. RP-89-98 and RP89-133, on February 12, 1990, by an order in Docket No. TM90-5-32, on December 13, 1989 by an order in Docket No. TM90-4-32, and on November 22, 1989, by an order in Docket No. RP89-178. Specifically, K N's filing reflects changes in the principal amount of take-or-pay buyout-buydown costs billed to K N by CIG resulting from CIG's filings.

K N has requested that the Commission accept this filing to become effective May 1, 1990.

K N states that copies of this filing are being served on all of its jurisdictional sales customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before April 20, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 90-9143 Filed 4-19-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ89-1-46-024]

Amendment to Compliance Filing; Kentucky West Virginia Gas Co.

April 13, 1990.

Take notice that on April 10, 1990, Kentucky West Virginia Gas Company (Kentucky West) filed a seventh amendment to its March 30, 1989 compliance filing so as to extend the proposed effective date for the proposed tariff sheets to July 1, 1990.

Kentucky West states that the tariff sheets filed March 30, 1989, were filed in compliance with the Commission's "Order Rejecting Compliance Filing" issued in the referenced proceedings on March 15, 1989, and in accordance with the mandate of the United State Court of Appeals of the Fifth Circuit, issued in *Kentucky West Virginia Gas Co.* v. *FERC*, 780 F.2d 1231 (5th Cir. 1986).

Kentucky West States that, under the tariff sheets filed March 30, 1989, it would bill its customers directly for the difference between (1) the amounts each such customer paid during the period in which Kentucky West was required to price certain of its company production at cost of service rather than Natural Gas Policy Act (NGPA) rates; and (2) the amounts each such customer would have paid if Kentucky West, during such time period, had not been denied the right to price its pipeline production at NGPA prices, plus interest calculated in accordance with the Commission's regulations. Kentucky West states further that its customers are given the option of paying the direct billing amount either: (1) By a lump-sum payment to be made by May 1, 1989; (2) in monthly installments of direct billing amounts, plus interest, to be paid over a period not to exceed 84 months; or (3) by a lump-sum payment during the installment period.

Several amendments have been filed by Kentucky West requesting an extension of the effective date for such filing and an extension of the deadline for interventions or protests. On February 12, 1990, Kentucky West filed an amendment to its March 30, 1989 compliance filing changing the proposed effective date to May 1, 1990, and extending the deadline for interventions or protests until April 16, 1990.

Kentucky West states that during the past month it has made substantial progress in settlement dicussions, but that if settlement is to be achieved, it will require one additional 60-day period. Therefore, Kentucky West is amending its filing so as to extend the proposed effective date of the tariff sheets filed to May 1, 1990. In this

regard, Kentucky West asks that the provisions of § 154.22 of the Commission's Regulations be waived to the extent necessary to permit such extension.

Kentucky West states it has previously waived interest concerning the direct billing amounts involved so as to encompass the 12 months of May 1989 through April 1990. Kentucky West states it believes for the final 60-day extension it is equitable that any waiver of interest be shared between itself and other parties. Kentucky West states it is willing to waive 50 percent of any interest to which it is entitled during such 60-day period.

Kentucky West states that it has contacted all parties to these proceedings and the Commission Staff, and no party nor the Commission Staff have any objection to this extension.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1989)). All such protests should be filed on or before June 15, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-9144 Filed 4-19-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM90-7-16-000]

Proposed Changes in FERC Gas Tariff; National Fuel Gas Supply Corp.

April 13, 1990.

Take notice that on April 9, 1990, National Fuel Gas Supply Corporation ("National") tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, to be effective May 1, 1990.

First Revised Sheet Nos. 71.1 through 71.2
First Revised Sheet Nos. 71-A.1 through 71-A.3
First Revised Sheet Nos. 71-B.1 through 71-B.2
Fifth Revised Sheet No. 71-C
First Revised Sheet Nos. 72.1 through 72.3
Original Sheet No. 72.4
First Revised Sheet Nos. 72-A.1 through 72-A.7
First Revised Sheet Nos. 72-B.1 through 72-B.4
Original Sheet Nos. 72-B.5 through 72-B.7
Sixth Revised Sheet Nos. 72-C

National states that the purpose of this filing is to update the amount of take-or-pay charges approved by the Federal Energy Regulatory Commission to be billed to National by its pipeline-suppliers and to be recovered by National by operation of section 20 of the General Terms and Conditions to National's FERC Gas Tariff, First Revised Volume No. 1. National further states that its pipeline-suppliers which have received approval to bill take-or-pay charges to National are: Columbia Gas Transmission Corporation, CNG Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation and Tennessee Gas Pipeline Company.

Copies of National's filing were served on National's jurisdictional customers and on the interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 214 or 211 of the Commission's Rules of Practice and Procedure (18 FR 385.214 or 385.211). All such motions or protests should be filed on or before April 20, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-9145 Filed 4-19-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM90-13-28-000]

Proposed Changes in FERC Gas Tariff; Panhandle Eastern Pipe Line Co.

April 13, 1990.

Take notice that on April 6, 1990 Panhandle Eastern Pipe Line Company (Panhandle) tendered for filing the following revised tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

First Revised Sheet No. 3-C.16
First Revised Sheet No. 3-C.17
First Revised Sheet No. 3-C.18

The proposed effective date of these revised tariff sheets is May 1, 1990.

Panhandle states that the revised tariff sheets filed herewith reflect revisions to the Order No. 500 take-or-pay direct billing amounts approved by Commission Orders dated April 28, 1989 in Docket No. RP89-134-000, October 10, 1989 in Docket No. RP89-125-000, *et al.*, and January 10, 1990 in Docket Nos. TM90-10-28-000 and TM90-11-28-000.

Panhandle further states that the revised tariff sheets referenced above reflect the first annual reconciliation filing and first annual adjustment to carrying charges and monthly TOP Fixed Surcharges in accordance with section 23 of Panhandle's FERC Gas Tariff, Original Volume No. 1.

Copies of this letter and enclosures are being served on all affected jurisdictional sales customers and appropriate state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such petitions or protests should be filed on or before April 20, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of Panhandle's filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-9146 Filed 4-19-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP85-177-079]

Proposed Changes in FERC Gas Tariff; Texas Eastern Transmission Corp.

April 13, 1990.

Take notice that Texas Eastern Transmission Corporation (Texas Eastern) on April 9, 1990 tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, six copies of the following tariff sheets:

Substitute Second Revised Sheet No. 202
Substitute Second Revised Sheet No. 208
Substitute Second Revised Sheet No. 216

Texas Eastern states that the purpose of this filing is to make the clarifications in Rate Schedules SS, SS-2, and SS-3 required by the Commission's March 23, 1990 order.

The proposed effective date of the tariff sheets listed above is March 1, 1990.

Copies of the filing were served on Texas Eastern's jurisdictional customers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such protests should be filed on or before April 20, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90–9147 Filed 4–19–90; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TM90–7–17–000]

Texas Eastern Transmission Corp.; Proposed Changes in FERC Gas Tariff

April 13, 1990.

Take notice that Texas Eastern Transmission Corporation (Texas Eastern) on April 9, 1990 tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, six copies of the following tariff sheets:

Substitute Sixth Revised Sheet No. 52
Substitute Sixth Revised Sheet No. 53
Substitute Fifth Revised Sheet No. 54
Substitute Sixth Revised Sheet No. 55

Texas Eastern states that the purpose of this filing is to track modifications to United Gas Pipe Line Company's (United) take-or-pay charges as proposed by United in Docket No. RP90–91–001 on March 23, 1990.

The proposed effective date of the above tariff sheets is April 1, 1990.

Copies of the filing were served on Texas Eastern's jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before April 20, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90–9148 Filed 4–19–90; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP89–7–004]

Proposed Changes in FERC Gas Tariff; Transcontinental Gas Pipe Line Corp.

April 13, 1990.

Take notice that Transcontinental Gas Pipe Line Corporation (Transco) on April 2, 1990 tendered for filing certain original and revised tariff sheets to its FERC Gas Tariff Second Revised Volume No. 1. The proposed effective date is April 2, 1990.

On July 27, 1989, the Commission issued a certificate of public convenience and necessary which, *inter alia*, authorized Transco to provide a new firm storage service to eight customers under a proposed Rate Schedule SS–2 for a term of fifteen years. The Commission's Order also authorized Transco to construct and operate certain pipeline facilities in the states of New Jersey and Pennsylvania.

Transco states that the instant tariff filing incorporates revisions to the proposed SS–2 rates required by the Commission's July 27, 1989 Order. In that regard, the Commission established revised rates for the Transco component of the SS–2 service based on the use of a modified fixed variable rate design methodology instead of the straight fixed variable rate design proposed by Transco. Transco states that, in this filing, it has calculated a revised cost of service for the proposed SS–2 service to reflect the deletion of an amount to recover the fuel expense. Transco states that its proposal inadvertently provided for a potential double recovery of fuel (once in the cost of service through the transportation rate and once in-kind from the shipper). Based upon the fact that both National Fuel and Penn-York will retain fuel and in accordance with customer requests, Transco states that it will retain fuel associated with this service. In that regard, Transco states that the Pro Forma Rate Schedule SS–2 service agreement specifies that the shipper will provide the fuel associated with Transco's service. In addition, Transco states that the Rate Schedule SS–2 has been revised to provide for the collection of a Commodity Producer Settlement (PSP) Charge to the extent applicable to Buyers as required by the Commission's Order.

Transco states that copies of the filing are being mailed to each of its customers and interested State Commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such protests should be filed on or before April 20, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90–9149 Filed 4–19–90; 8:45 am]

BILLING CODE 6717–01–M

Office of Hearings and Appeals

Cases Filed During Week of March 9 Through March 16, 1990

During the Week of March 9 through March 16, 1990, the appeals and applications for exception or other relief listed in the appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Under DOE procedural regulations, 10 CFR part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585.

Dated: April 11, 1990.

George B. Breznay,

Director, Office of Hearings and Appeals.

List of Cases Received by the Office of Hearings and Appeals

[Week of March 9 through March 16, 1990]

Date	Name and location of applicant	Case no.	Type of submission
Mar. 12, 1990	Metrix International Corporation; Charleston, WV	LFA-0032	Appeal of an information request denial. If granted: The February 23, 1990 Freedom of Information Request Denial issued by the Office of Procurement Operations would be rescinded, and Metrix International Corporation would receive access to DOE information.
Mar. 12, 1990	Mulgrew Oil Company; Dubuque, Iowa	LEE-0012	Exception to the reporting requirements. If granted: Mulgrew Oil Company would not be required to file EIA-982B, "Resellers'/Retailers' Monthly Petroleum Product Sales Report."
Mar 12, 1990	William Albert Hewgley; Kingston, Tennessee	LFA-0033	Appeal of an information request denial. If granted: The October 17, 1989 Freedom of Information Request Denial issued by the Oak Ridge Operations Office would be rescinded, and William Albert Hewgley would receive access to DOE information.
Mar. 13, 1990	Good Hope Refineries; Houston, Texas	LFX-0002	Supplemental subpart V refund procedures. If granted: Special Refund Procedures pursuant to 10 CFR part 205, subpart V, would be implemented to distribute additional funds in connection with the July 3, 1985, Decision and Order issued in the matter of Good Hope Refineries (Case No. HEF-0211).
Mar. 14, 1990	Center for Community Action; Lumberton, North Carolina.	LFA-0034	Appeal of an information request denial. If granted: Center for Community Action would receive access to DOE information.
Mar. 14, 1990	David DeKok; Harrisburg, Pennsylvania	LFA-0035	Appeal of an information request denial. If granted: The February 12, 1990 Freedom of Information Request Denial issued by the Office of Administrative Services would be rescinded, and David DeKok would receive a waiver of search and copying fees and access to DOE information about the Three Mile Island nuclear accident of 1979.
Mar. 14, 1990	Exxon/East Park Exxon; Hardin, Kentucky	RR307-4	Request for modification/rescission in the Exxon refund proceeding. If granted: The March 8, 1990 Decision and Order (Case No. RF307-10112) issued to East Park Exxon would be modified regarding the obligation of Energy Refunds, Inc. to repay a duplicate refund issued to the firm's client.
Mar. 16, 1990	International Financial Corporation; Castries, St. Lucia, West Indies.	RR272-55	Request for modification/rescission in the crude oil refund proceeding. If granted: The January 11, 1990 Decision and Order (Case No. RR272-55) issued to International Financial Corporation would be modified regarding the firm's application for refund submitted in the Crude Oil Refund proceeding.

Refund Applications Received

Date received	Name of refund proceeding/Name of refund application	Case number
3/9/90	State escrow distribution	RF302-8
3/9/90 thru 3/16/90	Gulf oil refund, application received	RF300-11020 thru RF300-11043
3/9/90 thru 3/16/90	Atlantic richfield, application received	RF304-11545 thru RF304-11595
3/9/90 thru 3/16/90	Texaco oil refund, application received	RF321-714 thru RF321-2116
3/12/90	Fireman's home	RF272-78510
3/12/90	James Swarner	RF272-78511
3/12/90	M. Terry Woolum	RF272-78512
3/12/90	Ralph E. Herin	RF272-78513
3/12/90	Pine Hill farm	RF272-78514
3/12/90	Sharon K. Watkins	RF272-78515
3/13/90	W. Gordon Buchanan	RF272-78516
3/13/90	Gordon E. Jackson	RF272-78517
3/13/90	Hesperia Shell	RF315-9896
3/13/90	Antietam Exxon	RF307-10113

[FR Doc. 90-9225 Filed 4-19-90; 8:45 am]
BILLING CODE 6450-01-M

Proposed Refund Procedures

AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Notice of Proposed Implementation of Special Refund Procedures.

SUMMARY: The Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) announces the proposed procedures for the disbursement of $48,000,000, plus accrued interest, obtained by the DOE under the terms of a consent order entered into with Enron Corp. The proposed procedures cover the following subsidiaries of Enron Corp.: HNG Petrochemicals, Inc., HNG Propane Company, HNG Products Company, Florida Hydrocarbons Company, P&O Falco, Inc., UPG, Inc. and Northern Propane Gas Company. The OHA has tentatively determined that the funds will be distributed in accordance with the DOE's special refund procedures, 10 CFR part 205, subpart V.

DATE AND ADDRESS: Comments must be filed in duplicate within 30 days of publication of this notice in the **Federal Register** and should be addressed to the Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. All comments should display a reference to case number KEF-0116.

FOR FURTHER INFORMATION CONTACT: Thomas L. Wieker, Deputy Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586-2390.

SUPPLEMENTARY INFORMATION: In accordance with section 205.282(b) of the procedural regulations of the Department of Energy (DOE), 10 CFR 205.282(b), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision and Order sets forth the

procedures that the DOE has tentatively formulated to distribute $48,000,000 that has been remitted by Enron Corp. to the DOE to settle possible violations of the federal petroleum price and allocation regulations. The proposed procedures cover the following subsidiaries of Enron Corp.: HNG Petrochemicals, Inc., HNG Propane Company, HNG Products Company, Florida Hydrocarbons Company, P&O Falco, Inc., UPG, Inc. and Northern Propane Gas Company. The DOE is currently holding the funds in an interest bearing account pending distribution.

Applications for refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized. Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to submit two copies of their comments. Comments should be submitted within 30 days of the publication in the **Federal Register**, and should be sent to the address set forth at the beginning of this notice. All comments received will be available for public inspection between the hours of 1 p.m. through 5 p.m., Monday through Friday, except federal holidays, in the Public Reference Room of the Office of Hearings and Appeals, located in room 1E-234, 1000 Independence Avenue, SW., Washington, DC 20585. If commentors express sufficient interest in presenting their views orally, the DOE will convene a public hearing. In the event we determine to hold a hearing, notice will be given in the **Federal Register**.

Dated: April 10, 1990.

George B. Breznay,

Director, Office of Hearings and Appeals.

Proposed Decision and Order of the Department of Energy

Implementation of Special Refund Procedures

April 10, 1990.

Name of Firm: Enron Corp.
Date of Filing: September 14, 1988.
Case Number: KEF-0116.

On September 14, 1988, the Economic Regulatory Administration (ERA) filed a Petition with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) requesting that the OHA formulate and implement procedures for distributing funds obtained through the settlement of enforcement proceedings between Enron Corp. (Enron) and the DOE. 10 CFR, part 205, subpart V.

I. Background

Enron was a "refiner", "reseller", "retailer", "gas plant operator" and "gas plant owner" as those terms are defined in 10 CFR 212.31 and 212.162. Enron was therefore subject to the Mandatory Petroleum Price and Allocation Regulations set forth at 10 CFR parts 211 and 212. Enron is the result of a 1985 merger between Internorth, Inc. and Houston Natural Gas Corp. During the period January 1, 1973 through January 27, 1981, Enron engaged in, among other things, the sale, refining and processing of natural gas liquids (NGLs) and natural gas liquid products (NGLPs). An ERA audit of Enron records revealed possible violations of the Mandatory Petroleum Price Regulations, 10 CFR part 212, subparts E and K, in certain sales of Enron's NGLs and NGLPs during the period September 1973 through October 1978 (the audit period). Consequently, the ERA issued a Proposed Remedial Order (PRO) to Enron on September 1, 1987, alleging that Enron committed pricing violations in its sales of NGLs and NGLPs during the audit period.[1]

In order to settle all claims between Enron and the DOE, the two parties entered into a Consent Order (the Consent Order) that resolves all matters relating to Enron's compliance with the federal petroleum price and allocation regulations during the period January 1, 1973 through January 27, 1981 (the Consent Order period). The Consent Order became final on July 27, 1988. Execution of the Consent Order is neither an admission by Enron nor a finding by the DOE of any violation by Enron of any statute or regulation. Consent Order at ¶ 503.

The Consent Order defines "Enron" to include Enron and all of its subsidiaries, affiliates (including the acts of such companies before they were subsidiaries or affiliates), prior subsidiaries, predecessors, successors in interest and their petroleum-related activities. Consent Order at ¶ 203. The following is a list of the Enron subsidiaries and affiliates that made sales of controlled refined products to unrelated third parties, and are therefore covered by this Consent Order: (1) The Houston Natural Gas Corp. "group"—HNG Petrochemicals, Inc., HNG Propane Company, HNG Products Company, Florida Hydrocarbons Company. (2) The Internorth "group"—P&O Falco, Inc., UPG, Inc., Northern Propane Gas Company.

Under the terms of the Consent Order, Enron deposited $48,000,000 into an interest-bearing escrow account maintained by the Department of the Treasury for ultimate distribution by the DOE. These monies ($48,000,000) were paid in full on August 26, 1988. This Proposed Decision and Order sets forth the OHA's tentative plan for distributing these funds to qualified purchasers of Enron's covered products.

[1] These alleged violations were committed by UPG Inc., a wholly owned subsidiary of Enron's predecessor, Internorth, Inc.

II. Proposed Refund Procedures

As we indicated above, the Consent Order settles:

> All civil and administrative claims and disputes, whether or not heretofore asserted, between the DOE, * * *, and Enron, * * *, relating to Enron's compliance with the federal petroleum price and allocation regulations, * * *, during the period January 1, 1973 through January 27, 1981 * * *.

Consent Order at ¶ 101. The phrase federal petroleum price and allocation regulations is defined by the Consent Order as:

> All statutory requirements and administrative regulations and orders regarding the pricing and allocation of crude oil and refined petroleum products, including the entitlements and mandatory oil imports programs administered by the DOE. The federal petroleum price and allocations regulations include (without limitation) the pricing, allocation, reporting, certification, and recordkeeping requirements imposed by or under the Economic Stabilization Act of 1970, the Emergency Petroleum Allocation Act of 1973, the Federal Energy Administration Act of 1974, Presidential Proclamation 3279, all applicable DOE regulations codified in 6 CFR parts 130 and 150 and 10 CFR parts 205, 210, 211, 212 and 213, and all rules, rulings guidelines, interpretations, clarifications, manuals, decisions, orders, notices, forms, and subpoenas relating to the pricing and allocation of petroleum products. The provisions of 10 CFR 205.199J and the definitions under the federal petroleum price and allocations regulations shall apply to this Consent Order, except to the extent inconsistent herewith.

Consent Order at ¶ 203. This language was intended to cover any violations by Enron of the regulations governing crude oil as well as refined products. However, the Consent Order does not give the OHA any guidance regarding the proper allocation of the Consent Order funds between refined products and crude oil. The Proposed Consent Order does state that "[t]he major regulatory areas of disputes between ERA and Enron concerned reallocation of costs permitted under the regulations, the proper computation of the May 15, 1973 weighted average sales price for one of its propane classes of purchaser, and the applicability of 10 CFR subpart K, to a portion of Enron's sales of NGL's and NGLP's." 53 FR 22701 at 22702 (June 17, 1988). Accordingly, because the major areas of dispute concerned

Enron's compliance with the regulations as they applied to its NGLs and NGLPs operations, the OHA believes that it is reasonable to allocate only 20 percent of the Consent Order funds to the crude oil pool.

A. Distribution of the Enron Crude Oil Funds

We propose that the Enron crude oil monies, $9,600,000, plus interest, be disbursed in accordance with the DOE's Modified Statement of Restitutionary Policy in Crude Oil Cases (MSRP), 51 FR 27899 (August 4, 1986), using the procedures described in *New York Petroleum, Inc., et al.*, 18 DOE ¶ 85,435 (1988).[2] Up to 20 percent of those funds, $1,920,000, will be distributed to injured parties in the DOE's subpart V crude oil refund proceeding. Refunds to eligible claimants in that proceeding will be based on a per-gallon refund amount derived by dividing the sum of all crude oil overcharge monies in escrow by the total U.S. consumption of petroleum products during the period of federal petroleum price controls.[3] The principal volumetric refund amount associated with the Enron crude oil funds is $0.00000475 per gallon. For further information concerning application procedures in the Subpart V crude oil proceeding, *see Texaco Inc.*, 19 DOE ¶ 85,200, *corrected*, 19 DOE ¶ 85,236 (1989).[4]

Under the terms of the MSRP, we propose that 80 percent of the Enron crude oil funds, $7,680,000, plus interest, as well as any portion of the above-mentioned 20 percent reserve which is not distributed, be divided equally between the states and federal government for indirect restitution. Refunds to the states will be in proportion to the consumption of petroleum products in each state during the period of price controls. *E.g., id.* at 88,375.

[2] Shortly after issuance of the MSRP, the OHA announced its intention to apply the MSRP in all Subpart V proceedings involving alleged crude oil violations and solicited comments concerning the refund procedures. 51 FR 29689 (August 20, 1986). On April 10, 1987, the OHA issued a Notice analyzing the comments and setting forth final procedures regarding applications for crude oil refunds. 52 FR 11737 (April 10, 1987).

[3] It is estimated that 2,020,997,335,000 gallons of petroleum products were consumed in the United States during the period August 1973 through January 1981. *Mountain Fuel Supply Company*, 14 DOE ¶ 85,475 at 88,868 n. 4. (1986).

[4] Enron also produced and sold crude oil condensate. Under the DOE price regulations, crude oil condensate was treated as crude oil. *See* Ruling 1975-18, 2 Fed. Energy Guidelines ¶ 16,058 at 16,657. Any direct purchaser of Enron crude oil that was overcharged on those purchases may apply for a refund based upon the procedures established in other proceedings for the evaluation of such claims. *E.g., id.* at 88,372, *corrected*, 19 DOE ¶ 85,236 (1989).

B. Eligibility for Refunds From the Refined Products Funds

To the extent that it is possible, the settlement amount of $38,400,000, plus accrued interest, will be distributed to purchasers of covered Enron NGLs, NGLPs and other covered refined products who can show that they were injured by Enron's pricing practices during the period January 1973 through January 27, 1981.[5]

C. Calculation of Refund Amount

We propose adopting a volumetric method to apportion the Enron escrow account. Under this volumetric refund aprpoach, a claimant's allocable share of the refined products pool is equal to the number of gallons of covered products purchased during the Consent Order period times a per gallon refund amount. We will derive the volumetric figure (per gallon refund amount) by dividing the $38,400,000 received from Enron by the total volume of covered products sold by the firm during the regulatory period. This yields a volumetric refund amount of $.004323 per gallon, exclusive of interest.[6] This method is based upon the presumption that the alleged overcharges were spread equally over all gallons of covered products sold by Enron during the regulatory period. *E.g., American Pacific International, Inc.*, 14 DOE ¶ 85,158 at 88,293 (1986) (*API*).[7]

Under the volumetric approach, an eligible claimant will receive a refund equal to the number of gallons of covered products that it purchased from Enron during the period January 1973 through the appropriate date of decontrol of each product, multiplied by the per gallon volumetric amount for this proceeding. In addition, each successful claimant will receive a pro rata portion of the interest that has accrued on the Enron funds since the date of remittance.

As in previous cases, we will establish a minimum amount of $15 for refund claims. *E.g., Uban Oil Co.*, 9 DOE ¶ 82,541 at 85,225 (1982).

1. Showing of Injury

We propose that each claimant will be required to document its purchases of Enron's covered products during the Consent Order period. In addition, we propose to require an applicant to demonstrate that it was injured by the alleged overcharges. In order to demonstrate that it did not subsequently raise its prices and thereby recover the increased costs associated with Enron's alleged overcharges, a claimant will have to show that it maintained banks of unrecovered product costs. We are willing to accept information establishing with reasonable likelihood that a claimant had banks. *Seminole Refining, Inc.*, 12 DOE ¶ 85,188 (1985); *see also Bayou State Oil Corp.*, 12 DOE ¶ 85,197 (1985). In order to demonstrate injury, a claimant must also show that market conditions would not permit it to pass through those increased costs to its customers. *E.g., API* at 88,295.

2. Small Claims Presumption

We also propose to adopt a presumption that resellers, retailers and refiners seeking volumetric refunds of $10,000 or less were injured by Enron's pricing practices. *Texaco Inc.*, 20 DOE ¶ 85,147 (1990). In many prior proceedings, we have established a small claims threshold of $5,000. *E.g., Gulf Oil Corporation*, 16 DOE ¶ 85,381 (1987). In this proceeding, the volumetric factor is significantly higher than in most proceedings. As a result, the allocable share of many small retailers, resellers and refiners who would typically qualify for a refund at or below the usual small claims amount of $5,000 will be well above that amount in this proceeding. If we keep the small claims threshold at $5,000 in this proceeding, it would increase the number of firms, especially very small firms, that would be faced with the burden of making a detailed showing of injury in order to receive their allocable share. It would also increase the burden on this Office because of the need to analyze more detailed injury showings and would thus slow down the evaluation of claims. Therefore, to minimize these burdens, we are proposing a small claims threshold of $10,000. Under the small claims presumption, an applicant seeking a total refund of $10,000 or less will not be required to make a detailed

[5] Applicants are only eligible to receive refunds based upon covered products purchased from the beginning of the Consent Order period until the last date that the particular product claimed was subject to price controls. Therefore, an applicant will not be eligible to receive a refund based upon butane and natural gasoline purchased after December 31, 1979, or ethane purchased after March 31, 1974, because these products were decontrolled after those dates. *E.g., Gulf Oil Corp./E.I. du Pont de Nemours*, 14 DOE ¶ 85,027 (1986).

[6] To compute this figure, we estimated that Enron sold a total of 8,881,302,806 gallons of covered products during the period from January 1973 through January 27, 1981.

[7] Nevertheless, we realize that the impact on an individual claimant may have been greater than the volumetric amount. We therefore propose that the volumetric presumption will be rebuttable, and we will allow a claimant to submit evidence detailing the specific overcharges that it incurred in order to be eligible for a larger refund. *E.g., Standard Oil Co./Army and Air Force Exchange Service*, 12 DOE ¶ 85,015 (1984).

demonstration of injury.[8] Such an applicant need only document its purchase volume of Enron covered products.

3. Medium-Range Presumption

We propose, that in lieu of making a detailed showing of injury, a reseller, retailer or refiner claimant whose allocable share of the Consent Order funds for purchases of Enron's refined products exceeds $10,000 may elect to receive as its refund the larger of $10,000 or 60 percent of its allocable share up to $50,000.[9] The use of this presumption reflects our conviction that these claimants were likely to have experienced some injury as a result of the alleged overcharges. In other proceedings involving NGLs and NGLPs, we have determined that a 60 percent presumption for the medium-range purchasers of NGLs and NGLPs accurately reflected the amount of their injury as a result of their purchases of those products. *Sauvage Gas Co.*, 17 DOE ¶ 85,304 (1988); *see also Suburban Propane Gas Corp.*, 16 DOE ¶ 85,382 (1987). Because approximately 87 percent of Enron's sales of covered products were of NGLs and NGLPs, we believe that it is appropriate to adopt 60 percent as the medium-range injury presumption in this proceeding. Accordingly, a claimant in this group will only be required to provide documentation of its purchase volumes of Enron's covered products in order to be eligible to receive a refund of 60 percent of its total allocable share.

4. End-Users

We propose to adopt the presumption that end-users, i.e. ultimate consumers, whose businesses are unrelated to the petroleum industry, were injured by Enron's alleged overcharges. *Marion Corp.*, 12 DOE ¶ 85,014; *see also Thornton Oil Corp.*, 12 DOE ¶ 85,112 (1984). We therefore propose that end-users of Enron products need only document their purchase volumes to make a sufficient showing of injury and receive their full allocable share.

5. Regulated Firms and Cooperatives

We propose that claimants whose prices for goods and services are regulated by a government agency (such as a public utility), or by the terms of a cooperative agreement will be presumed to have absorbed the alleged overcharges. Accordingly, such claimants need only submit documentation of purchase volumes used by them or, in the case of cooperatives, sold to their members in order to receive a full volumetric refund. However, regulated firms or cooperatives will be required to certify that they will pass any refund on to their customers or member-customers, provide us with a full explanation of how they plan to accomplish the restitution, and certify that they will notify the appropriate regulatory body or membership group of their receipt of the refund. *Marathon Petroleum Co.*, 14 DOE ¶ 85,269 at 88,515 (1986); *see also Office of Special Counsel*, 9 DOE ¶ 82,538 at 85,203 (1982). We will not require a public utility seeking a refund of $10,000 or less to submit the above referenced certifications and explanation. Sales of covered products by cooperatives to non-members will be treated in the same manner as sales by other resellers or retailers.

6. Indirect Purchasers

We propose that firms which made indirect purchases of covered Enron products during the Consent Order period may also apply for refunds. If an applicant did not purchase directly from Enron, but believes that covered products it purchased from another firm were originally purchased from Enron, the applicant must establish its basis for that belief and identify the reseller from whom the products were purchased. Indirect purchasers who either fall within a class of applicant whose injury is presumed, or who can prove injury, may be eligible for a refund if the reseller of Enron products passed through Enron's alleged overcharges to its own customers. *E.g., Dorchester Gas Corp.*, 14 DOE ¶ 85,240 at 88,451–52 (1986).

7. Spot Purchasers

We propose to adopt the rebuttable presumption that a claimant who made only spot purchases from Enron was not injured as a result of those purchases. A claimant is a spot purchaser if it made only sporadic purchases of significant volumes of covered Enron products. Accordingly, a spot purchaser claimant must submit specific and detailed evidence to rebut the spot purchaser presumption and to establish the extent to which it was injured as a result of its spot purchases from Enron. *E.g., Office of Enforcement*, 8 DOE ¶ 82,597 at 85,396–97 (1981).

8. Applicants Seeking Refunds Based on Allocation Claims

We also recognize that, while the Consent Order makes no mention of known allocation violations, we may receive claims alleging Enron's failure to furnish petroleum products that it was obliged to supply under the DOE allocation regulations that became effective in January 1974. *See* 10 CFR part 211. Such claims could be based on the Consent Order's broad language regarding the matters settled. *See* section II above. Any such application will be evaluated with reference to the standards set forth in subpart V implementation decisions such as *Office of Special Counsel*, 10 DOE ¶ 85,048 at 88,220 (1982), and refund application cases such as *Mobil Oil Corp./Reynolds Industries, Inc.*, 17 DOE ¶ 85,608 (1988), *Marathon Petroleum Corp./Research Fuels, Inc.*, 17 DOE ¶ 85,575 (1989), action for review pending, CA–3–89–2983–G (N.D. Tex. filed Nov. 22, 1989). These standards generally require an allocation claimant to demonstrate the existence of a supplier/purchaser relationship with the Consent Order firm and the likelihood that the Consent Order firm failed to furnish petroleum products that it was obliged to supply to the claimant under 10 CFR part 211. In addition, the claimant should provide evidence that it sought redress from the alleged allocation violation. Finally, the claimant must establish that it was injured and document the extent of the injury.

In our evaluation of whether allocation claims meet these standards, we will consider various factors. For example, we will seek to obtain as much information as possible about the Agency's treatment of complaints made to it by the claimant. We will also look at any affirmative defenses that Enron may have had to the alleged allocation violation. *E.g., id.* In assessing an allocation claimant's injury, we will evaluate the effect of the alleged allocation violation on its entire business operation with particular reference to the amount of product that it received from suppliers other than Enron. In determining the amount of an allocation refund, we will utilize any information that may be available regarding the amount of Enron allocation violations in general and regarding the specific allocation violation alleged by the claimants. Finally, since the Enron Consent Order reflects a negotiated compromise of the issues involved in an enforcement proceeding against Enron, as well as potential unknown violations, and the

[8] Resellers, retailers and refiners who can document that they purchased 2,313,093 gallons of Enron's covered products are eligible to receive the maximum refund under the small claims presumption.

[9] Resellers, retailers and refiners who purchased between 3,855,155 and 19,276,737 gallons of Enron's covered products may elect this presumption. Such claimants who purchased more than 19,276,737 gallons may elect to limit their claim to $50,000.

Consent Order amount is therefore less than Enron's potential liability, we will pro rate any allocation refunds that would otherwise be disproportionately large in relation to the Consent Order fund. *Cf. Amtel, Inc./Whitco, Inc.*, 19 DOE ¶ 85,319 (1989).

III. Distribution of Refunds Remaining After Consideration of All Refund Applications

In the event that money remains after all meritorious refund applications have been processed, the funds in the Enron escrow account will be disbursed in accordance with the provisions of the Petroleum Overcharge and Distribution Act of 1986 (PODRA). 15 U.S.C.A. §§ 4501–4507 (West Supp. 1989).

It is therefore ordered that: The refund amount remitted to the Department of Energy by Enron Corp. pursuant to the Consent Order finalized on July 27, 1988 will be distributed in accordance with the foregoing Decision.

[FR Doc. 90-9227 Filed 4-19-90; 8:45 am]

BILLING CODE 6450-01-M

Issuance of Decisions and Orders for the Week of March 12 Through March 16, 1990

During the week of March 12 through March 16, 1990 the decisions and orders summarized below were issued with respect to applications for exception or other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Request for Exception

Harbor Enterprises, Inc., 3/14/90; *Lee–0003*

Harbor Enterprises, Inc. (Harbor) filed an Application for Exception from the provisions of the Energy information Administration (EIA) reporting requirements in which the firm sought relief from filing Form EIA–782B, entitled "Reseller/Retailers' Monthly Petroleum Product Sales Report." In considering the request, the DOE found that the firm was not adversely affected by the reporting burden in a way that is significantly different from the burden borne by similar reporting firms, and because the firm is a "certainty unit," it could not be granted relief from filing. Accordingly, exception relief was denied.

Motion for Discovery

Salomon Inc., 3/15/90; *KRD–0720*

On April 3, 1989, Salomon Inc. filed a Motion for Discovery in connection with a pending Proposed Remedial Order (PRO) proceeding in which the Economic Regulatory Administration alleges that Salomon violated the layering and pricing provisions of the crude oil resale rule, set forth at 10 CFR part 212, Subpart L. Salomon also filed a Motion to Dismiss the PRO.

In denying Salomon's Motion to Dismiss, the DOE rejected Salomon's position that the nature of its pipeline transfers (i.e., multiple transfers in a given month at a given location, and the absence of back-to-back purchase and sale contracts) excused Salomon from the regulatory requirement to track crude oil. The DOE found that since the ERA's methodology for calculating the alleged layering violation relied on the firm's contemporaneous matching of groups of purchases and sales, the ERA's methodology was reasonable and any alleged deficiencies did not support Salomon's request for the application of a gross profits methodology. The DOE determined that if Salomon wished to challenge the ERA's methodology, Salomon had to provide an alternative tracing that grouped all purchases and sales of each type and grade of crude oil in a given pipeline in a given month.

In considering Salomon's requests for discovery on the issue of reseller services, the DOE determined that there was no regulatory ambiguity that would justify the requested discovery. In considering Salomon's request for the meaning of the word "firm," the DOE determined that such discovery was unnecessary since the DOE had determined that the actual operations of the subsidiaries as one unified crude oil department supported a grant of Salomon's request for single-firm treatment. Finally, in considering Salomon's request for the meaning of the word "sale," the DOE determined that the plain meaning of the word "sale" and, therefore, there was no regulatory ambiguity that would justify contemporaneous construction discovery.

Refund Applications

Best Products Co., Inc., 3/13/90; *RF272–37276*

The DOE issued a Decision and Order denying an Application for refund filed by Best Products Co., Inc. (Best) in the Subpart V crude oil proceeding. The DOE's denial was based on the fact that Best had applied for and been granted a refund from the Surface Transporters Escrow and had, thereby, waived their right to a refund in the crude oil proceeding.

Charter Co. Standard Oil Co. (Indiana)/*Standard Oil Co.* (Indiana)/*California, 3/12/90;* RQ23–546, RQ21–547, RQ251–542

The DOE issued a Decision and Order approving a second-stage refund application filed by the State of California in the Charter Co. and Amoco refund proceedings. California sought to use $2,043,235 in second-stage monies to develop programs to promote energy efficiency among Indian tribes. Possible programs include technology transfer of energy-efficient architectural designs, vanpooling, energy education, renewable energy demonstration projects, and irrigation efficiency programs. The OHA determined that the plan was restitutionary in nature and approved it.

Exxon Corporation/Georgia-Pacific Corporation, 3/16/90; RR307–3

The DOE considered a Motion for Reconsideration filed by Georgia-Pacific Corporation requesting an additional refund in the Exxon Corporation special refund proceeding based on the petroleum purchases of a Georgia-Pacific subsidiary, Brunswick Pulp & Paper Company. Since Georgia-Pacific did not request reconsideration of the prior determination that approved the firm's initial refund claim, the DOE determined that the firm's request should be subject to the standards and procedures governing the evaluation of new applications filed under 10 CFR part 205, subpart V. The DOE found that the application was filed over six months past the extended deadline and the applicant had failed to show good cause for the late filing. Accordingly, the Motion was denied.

Fremont County Road Department, 3/16/90; RC272–80

The DOE granted a Supplemental Order, concerning two Applications for Refund submitted by Fremont County Road Department in the subpart V crude oil refund proceedings. In two individual Decision and Orders issued by the DOE, the applicant was granted separate refund amounts based on duplicate gallonage claims. Accordingly, this Decision rescinded the second Decision and Order, *City of Graham, et al.*, Case Nos. RF300–60002, *et al.*, 19 DOE ¶ _____ (August 4, 1989), with respect to the applicant's claim. In addition, this Decision stated that the applicant shall remit to the DOE the $624 refund amount granted in the August 4, 1989 Decision.

Gibbons and Reed Co., 3/12/90; RF272–35765, RD272–35765

The DOE issued a Decision and Order granting a refund from crude oil overcharge funds to Gibbons and Reed Co. for purchases of refined petroleum

products during the period August 19, 1973 through January 27, 1981. A group of twenty-eight states and two territories of the United Stgates (the States) filed consolidated pleadings objecting to and commenting on the application. As evidence that the Applicant passed on its increased costs, the States submitted statistical reports indicating that the price of materials used in road construction increased in correlation to an increase in energy costs. In addition, the States submitted an affidavit of a consulting economist which stated that firms in the road construction industry in general were able to pass on any increased energy costs. The DOE determined that the evidence offered by the States was insufficient to rebut the presumption of end-user injury and that the Applicant should receive a refund. In addition, the Motion for Discovery filed by the States was denied. The amount of the refund granted in this Decision is $38,302.

Gulf Oil Corporation/B.F. Goodrich Company, 3/14/90; RF300–8191

The DOE issued a Decision and Order concerning an Application for Refund submitted in the Gulf Oil Corporation special refund proceeding by B.F. Goodrich Company (BFG), an end-user. BFG based its claim on a number of petroleum products, including butadiene, butylene, and styrene. Since the DOE found no evidence to show that styrene and butylene were controlled by the applicable DOE regulations, BFG did not receive a refund for these products. BFG did receive a refund for its purchases of butadiene. BFG's claim was approved under the end-user presumption of injury. The total refund granted in this Decision, including accrued interest, is $378,726.

Gulf Oil Corporation/Best Petroleum Company, Inc., et al., 3/13/90; RF300–9659, et al.

The DOE issued a Decision and Order concerning four Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. Each applicant established that it purchased some or all of its Gulf products indirectly from Gulf jobbers. These jobbers did not show that they passed on Gulf's alleged overcharges to their customers. Accordingly, we treated the four applicants in the same manner as we generally treat applicants who purchased directly from Gulf. P.A.D., Inc. originally filed three of these Applications. Fuel Refunds, Inc. filed "Amended Refund Applications" on behalf of two applicants involved in this Decision. Furthermore, Akin Energy also filed "amended" refund Applications on behalf of two applicants involved in this Decision. All correspondence, including the refund checks, was sent directly to the applicants. Each Application was approved using a presumption of injury. The sume of the refunds granted in this Decision is $6,761.

Gulf Oil Corporation/Knox Oil of Texas, Inc., 3/16/90; RF300–10985

The DOE issued a Decision and Order concerning an Application for Supplemental Order filed by Knox Oil of Texas, Inc. (Knox Oil) in the Gulf Oil Corporation special refund proceeding. In its application, Knox Oil requests that the DOE disburse the balance of a refund granted in an earlier decision. That refund had been placed in a special escrow account pending the resolution of an enforcement proceeding involving Knox Oil. Although Knox Oil entered into a consent order, the OHA determined that it is still not appropriate to disburse the refund to Knox Oil as it appears that the firm is experiencing financial difficulties which would affect its ability to make future payments to the DOE.

Gulf Oil Corporation/Sahara Oil Co., Inc. 3/12/90; RF300–5083

The DOE issued a Decision and Order concerning an Application for Refund submitted by an indirect purchaser in the Gulf Oil Corporation special refund proceeding. Because the indirect purchaser's supplier had already received a refund utilizing a presumption of injury in this proceeding, and because the indirect purchaser was able to substantiate that the products purchased originated from Gulf, the indirect purchaser's Application was approved in the same manner as applicants who purchased directly from Gulf. The total refund granted in this Decision, which includes both principal and interest, is $4,756.

Hardrives, Inc. 3/14/90; RF272–09880, RD272–09880

Hardrives, Inc., a highway construction contractor, filed an application for refund as an end-user of refined petroleum products in the subpart V crude oil refund proceeding. A group of state governments filed a statement of objection to Hardrives' claim, and a related motion for discovery. After considering the claim and the objections, OHA determined that the states had failed to produce any convincing evidence to show that Hardrives had been able to pass on the crude oil overcharges to its customers, and granted the refund application. The purported economic "evidence" submitted by the states consisted of theoretical generalizations that were not linked to the specific applicant. As in previous decisions, OHA rejected the states' contention that industry-wide data constituted sufficient evidence to rebut the presumption that end-users such as Hardrives were injured by crude oil overcharges. The refund approved was $33,501. The states' motion for discovery was denied.

Maple Leaf Real Estate, 3/12/90; RC272–81

The DOE issued a Supplemental Order concerning an Application for Refund submitted in the crude oil refund proceeding on behalf of Maple Leaf Real Estate (Case No. RF272–12849). Maple Leaf was granted a refund of $2 by *Farrell F. Beck, et al.* (Case Nos. RF272–12800, *et al.*). Energy Refunds, Inc., Maple Leaf's representative, sent a letter to the DOE which stated that it could not contact anyone at Maple Leaf; a check for $2 made out to the DOE was attached. Accordingly, the OHA rescinded the refund granted to Maple Leaf (Case No. RF272–12849) in *Farrell F. Beck, et al.*

Murphy Oil Corporation/MAC's Service Station, Collins Spur Station, 3/16/90; RF309–1344, RF309–1390

The DOE issued a Decision and Order granting two Applications for Refund in the Murphy Oil Corporation (Murphy) special refund proceeding. Both of these claimants were, at one time, represented by P.A.D., Inc. (P.A.D.) in the Murphy refund proceeding, but we sent the refunds granted in this Decision directly to the applicants, rather than to P.A.D. We sent the refunds directly to the claimants because P.A.D. is barred from representing refund claimants, due to its widespread violation of our refund procedures in its past submissions. *See P.A.D., Inc.*, 19 DOE ¶ 85,228 (1989). The total volume approved in this Decision was 1,954,656 gallons, and the total of the refunds granted was $2,003 (comprised of $1,597 in principal and $406 in interest).

Murphy Oil Corp./Yanke Spur Service, 3/16/90; RF309–369

The DOE issued a Decision and Order denying the application of Yanke Spur Service in the Murphy Oil Corporation special refund proceeding. Yanke, a consignee of Murphy products, had not attempted to rebut the presumption of non-injury for consignees established in *Murphy Oil Corporation*, 17 DOE ¶ 85,782 (1988). Accordingly, its application was denied.

New Enterprise Stone & Lime Co., Inc. Delzer Construction, Inc., 3/13/90; RF272–09830, RF272–09839

New Enterprise Stone & Lime Co., Inc. (New Enterprise) and Delzer

Construction, Inc. (Delzer) are both highway construction contractors. Each filed an application for refund as an end-user of refined petroleum products in the Subpart V crude oil refund proceeding. A group of state governments filed statements of objection to their claims. The applicants demonstrated the volume of their claims by consulting actual records and by using reasonable estimates of their purchases. OHA found, however, that New Enterprise had entered into several contracts during the period of price controls which contained price adjustment clauses. The firm had received compensation for approximately 60% of its purchases, or 4,352,518 gallons, of liquid asphalt during the period January 1, 1979 through January 27, 1981 as a result of those clauses. New Enterprise was not injured in those instances and is ineligible to receive a refund for the purchases covered by such clauses. After considering the remaining claims and the objections, OHA determined that the states had failed to produce any convincing evidence to show that either New Enterprise or Delzer had been able to pass on the crude oil overcharges to their customers, and granted the refund applications. The purported economic "evidence" submitted by the states consisted of theoretical generalizations that were not linked to the specific applicants. As in previous decisions, OHA rejected the states' contention that industry-wide data constituted sufficient evidence to rebut the presumption that end-users such as New Enterprise and Delzer were injured by crude oil overcharges. OHA granted New Enterprise a refund of $32,392, and granted Delzer a refund of $8,473.

Palo Pinto Oil and Gas/Louisiana, Standard Oil Company (Indiana)/ Louisiana, 3/15/90; RQ5–548, RQ21–549

The Office of Hearings and Appeals issued a Decision and Order partially approving the second-stage refund application filed by the State of Louisiana in the Palo Pinto Oil and Gas and Standard Oil Company (Indiana) proceedings. The OHA approved the State's proposal to spend $118,650 in *Amoco* monies on a series of Boiler Efficiency Workshops, determining that the workshops would provide direct restitution to injured consumers of petroleum products by decreasing both energy consumption and energy costs. The State also requested permission to spend $17,899 in *Palo Pinto* monies as a grant to the Christa McAuliffe Institute for Teachers to provide environmental education to secondary school teachers. The OHA denied this proposal because it would fail to benefit those who purchased petroleum products during the period of price controls.

Pedersen Oil, Inc./Defense Fuel Supply Center, 3/14/90; RF318–8

The DOE issued a Decision and Order concerning an Application for Refund filed by the Defense Fuel Supply Center (DFSC) in the Pedersen Oil, Inc., special refund proceeding. The applicant is an end-user that estimated its purchases of Pedersen products. Therefore, the claimant was presumed to have been injured and entitled to a refund. The DOE concluded that DFSC should receive a refund totaling $230, representing $153 in principal and $77 in accrued interest.

Schuchart Petroleum Co., A–R Fuels, Inc., 3/13/90; RF272–43, RF272–44

The DOE considered and rejected two identical Motions for Reconsideration filed by Schuchart Petroleum Co. and A–R Fuels, Inc. in the Subpart V crude oil refund proceedings. The claimants, both of whom were resellers during the period of mandatory price controls, argued that the testimony of Dr. Peter Linneman at the evidentiary hearing which OHA conducted in the Stripper Well Exemption Litigation establishes that they were injured by crude oil overcharges during the controls period. The DOE found that Linneman's testimony was not sufficient to establish injury because: (i) it was industry-wide as opposed to firm-specific; (ii) it failed to establish that these firms were competitively disadvantaged by the overcharges; and (iii) the testimony on the impact of crude oil overcharges on resellers was insufficiently developed.

Shell Oil Company/Ballard's Shell, 3/16/90; RF315–7932, RF315–8404, RF315–8739

The DOE issued a Decision and Order dismissing two Applications for Refund filed by Marcoin Business Services and Mark IV Business Services on behalf of Ballard's Shell. The DOE determined that the two applications had not been authorized by the applicant, had overstated the applicant's purchase volume, and were not signed by the applicant. The DOE granted a refund of $1,647 to Ted Ballard, the owner of Ballard's Shell, a reseller who filed on his own behalf in the Shell proceeding.

Standard Oil Co. (Indiana) et al./South Carolina, 3/15/90; RM21–163 et al., RQ251–550

The State of South Carolina requested permission to use a total of $425,856 in *Amoco* consent order funds for the initiation of a new restitutionary program. The State also proposed to enlarge a program approved in *Standard Oil Co. (Indiana)/South Carolina*, 14 DOE ¶ 85,097 (1986) and *Charter Company/South Carolina*, 14 DOE ¶ 85,286 (1986) through the re-allocation of $297,289 in second-stage monies previously approved for other plans, but not expended. Specifically, the States proposed the implementation of the Fuel-Saving Traffic Operational Management Program with its *Amoco* funds, under which "closed-loop signal systems" will be installed on four of the State's primary roadways. South Carolina will also modify its previous second-stage plan by expanding the Traffic Light Synchronization Program. With this increased funding for the Traffic Light Synchronization Program, the State will replace the signal controllers in one of its principal business districts, as well as providing a surveillance system on the Cooper River bridges to aid in the clearing of traffic jams on the bridges. South Carolina's Application for Refund and Motions for Modification were approved in full because they should provide timely restitution to the State's consumers of petroleum products.

Refund Applications

The Office of Hearings and Appeals granted refunds to refund applicants in the following Decisions and Orders:

Name	Case No.	Date
Aksjeselskapet Virik, et al	RF272–18822	March 14, 1990.
Ancira-Winton Chevrolet, Inc., *et al*	RF272–15830	March 15, 1990.
Atlantic Richfield Co., Fred D. Wikoff Co., Inc., et al	RF304–8943	March 15, 1990.
Exxon Corp., Bob's Exxon, et al	RF307–57	March 14, 1990.
Exxon Corp., Burnside-Ott Aviation Training Center, Inc., et al	RF307–9501	March 12, 1990.
Exxon Corp., Don's Exxon, et al	RF307–153	March 14, 1990.
Fife Rock Products Co	RF272–26194	March 13, 1990.
Gulf Oil Corp./Acadiana Gulf Oil Co., Inc.	RF300–5232	March 12, 1990.

Name	Case No.	Date
Gulf Oil Corp.:		
Arenz's Transport #16	RF300-9784	
Arenz's Transport #29	RF300-9785	
Arenz's Transport #33	RF300-9786	March 14, 1990.
Gulf Oil Corp./Cook's Gulf Service, et al	RF300-10459	March 15, 1990.
Gulf Oil Corp./Hayes Gulf	RF300-104097	March 15, 1990.
Gulf Oil Corp.:		
Peacock & Fletcher Oil Co. Inc	RF300-9300	
Rankin Oil Co	RF300-9367	March 14, 1990.
Gulf Oil Corp./R&W Oil Products, et al	RF300-6093	March 13, 1990.
Gulf Oil Corp.:		
Silvestri Service Gulf	RF300-10106	
Traphagen Oil Co	RF300-10381	March 14, 1990.
Gulf Oil Corp./Taylor Oil Co., Inc	RF300-10857	March 15, 1990.
Leon P. Clark, Jr	RF272-12423	March 14, 1990.
Murphy Oil Corp.:		
Lynchburg Oil Co., Inc	RF309-309	
Munn Oil Co., Inc	RF309-385	
Fast Foods	RF309-939	
Hinson Spur	RF309-944	March 15, 1990.
Murphy Oil Corp./Neault Petroleum Co., Inc., et al	RF309-451	March 16, 1990.
Pederson Oil, Inc./Nebert Brothers, Inc., et al	RF318-1	March 14, 1990.
Placid Oil Co./Chevron U.S.A., Inc	RF314-75	March 12, 1990.
Power Test Petroleum Distributors, Inc./Cataldo Automotive, Inc	R316-1	March 13, 1990.
State Construction, Inc	RF272-26225	March 13, 1990.
Waterborne Services, Inc., et al	RF272-76600	March 15, 1990.
330 East 46th Assoc., et al	RF272-77811	March 15, 1990.

Dismissals

The following submissions were dismissed:

Name	Case No.
Burlington Industries, Inc	RF307-9471
	RF307-9474
	RF307-9475
Carmen Deminico	RF307-8191
Cloverdale Gulf Service	RF300-9082
Crawford Service Station	RF300-8480
Fred Coriell	RF300-8484
Phil's Arco Service Station	RF304-8127
Public Service Electric & Gas Co	RR272-38
Robert R. Casey	RF307-8205
Shelquist Gulf	RF300-10269
Turnpike Exxon	RF307-8210
Weyerhaeuser Co	RF272-42011

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, room 1E-234, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, Monday through Friday, between the hours of 1 p.m. and 5 p.m., except federal holidays. They are also available in *Energy Management: Federal Energy Guidelines*, a commercially published loose leaf reporter system.

Dated: April 11, 1990.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 90-9226 Filed 4-19-90; 8:45 am]

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Western Area Power Administration

Stampede Division, Washoe Project—Notice of a Rate Order

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of rate order-Stampede Division, Washoe Project Power Rates.

SUMMARY: Notice is hereby given of the confirmation and approval, by the Deputy Secretary of the Department of Energy (DOE), of Rate Order No. WAPA-44 for placing power rates in effet on an interim basis for the marketing of nonfirm power from the Stampede Division, Washoe Project (Stampede).

Under Rate Order No. WAPA-44, Western Area Power Administration (Western) is establishing an annual bidding process for Stampede nonfirm energy. Annual bids for Stampede generation will be considered only if they meet or exceed the minimum rate (or floor rate) Western considers necessary to meet the expense of operating the plant. Western will also calculate the conventional cost-based rate necessary to meet the Stampede repayment obligation. This rate will be considered the highest necessary bid (or ceiling rate) for the Stampede nonfirm energy will be calculated annually. Western will annually issue a public notice in appropriate publications in the region, as well as letters to customers and interested parties, to the effect that Stampede nonfirm energy is available to the highest bidder at a rate ranging between the established floor and ceiling rates contained in the public notice. Entities interested in purchasing Stampede energy will submit bids to Western indicating the rate they are willing to pay within these parameters. The purchaser will pay for all Stampede nonfirm energy made available at the Stampede Powerplant Substation, except for the energy designated to service project-use loads.

For the period beginning April 1, 1990, through September 30, 1990, the floor and ceiling rates are 19.12 and 50.96 mills per kilowatthour (kWh), respectively.

The rate order further explains the rate development and discusses the principal factors leading to the decisions on the final rates.

EFFECTIVE DATE: The power rates will become effective on an interim basis on April 1, 1990.

FOR FURTHER INFORMATION CONTACT:

Mr. David G. Coleman, Area Manager, Western Area Power Administration, 1825 Bell Street, Suite 105, Sacramento, CA 95825 (916) 978-4418.

Mr. Robert Fullerton, Director, Division of Marketing and Rates, Western Area Power Administration, P.O. Box 3402, Golden, CO 80401-3398 (303) 231-1545.

SUPPLEMENTARY INFORMATION: By Delegation Order No. 0204-108, effective

December 14, 1983 (48 FR 55664), as amended May 30, 1986 (51 FR 19744), reassigned by DOE Notice 1110.29 dated October 27, 1988, and clarified by the Secretary of Energy Notice SEN–10–89 dated August 3, 1989, and subsequent revisions, the Secretary of Energy delegated: (1) To the Administrator of the Western Area Power Administration (Western) the authority on a nonexclusive basis to develop power and transmission rates; (2) to the Deputy Secretary the authority on a nonexclusive basis to confirm, approve, and place in effect on an interim basis power and transmission rates; and (3) to the Federal Energy Regulatory Commission (FERC) the authority on an exclusive basis to confirm, approve, and place in effect on a final basis, to remand or to disapprove rates developed by the Administrator under the delegation. This rate is issued pursuant to such delegations to the Administrator and the Deputy Secretary, and the procedures for public participation in power and transmission rate adjustments and extensions for the Alaska Power Administration, Southeastern Power Administration, Southwestern Power Administration, and Western at 10 CFR part 903, published at 50 FR 37835 on September 18, 1985, with corrections published at 50 FR 48075, November 21, 1985.

The proceeding for the proposed power rates and a 30-day customer consultation and comment period were initiated on August 14, 1989, with a notice in the **Federal Register** at 54 FR 33285–33288. On August 25, 1989, letters were sent to interested parties transmitting the **Federal Register** notice. Public information and comment forums were not held. Under Department of Energy procedures 10 CFR part 903, such forums are optional for power systems with installed capacity of less than 20,000 kilowatts. Stampede Powerplant capacity is 3,650 kilowatts, well under the 20,000 kilowatt limit, making the forums optional for Stampede. Western's decision not to hold public forums was primarily due to the absence of public interest and involvement in the rate development proceedings. Written comments were accepted through September 14, 1989. Comments were received from the Bureau of Reclamation and Sierra Pacific Power Company. The comments received have been considered in the preparation of the rate order.

Rate Order No. WAPA–44 confirming and approving power rates on an interim basis is hereby issued, and the rates will be promptly submitted to the FERC for confirmation and approval on a final basis.

Issued at Washington, DC, March 28, 1990.

W. Henson Moore,

Deputy Secretary.

Order Confirming, Approving, and Placing Stampede Division, Washoe Project Power Rates in Effect on an Interim Basis

March 28, 1990.

In the matter of Western Area Power Administration Stampede Division, Washoe Project Power Rates.

[Rate Order No. WAPA–44]

Pursuant to section 302(a) of the Department of Energy (DOE) Organization Act, 42 U.S.C. 7101 *et seq.*, the power marketing functions of the Secretary of the Interior and the Bureau of Reclamation (Reclamation), under the Reclamation Act of 1902, 43 U.S.C. 371 *et seq.*, as amended and supplemented by subsequent enactments, particularly section 9(c) of the Reclamation Act of 1939, 43 U.S.C. 485h(c), and the act of August 1, 1956, 70 Stat. 775, authorizing construction of the Washoe Project, were transferred to and vested in the Secretary of Energy. By Delegation Order No. 0204–108, effective December 14, 1983 (48 FR 55664), as amended May 30, 1986 (51 FR 19744), reassigned by DOE Notice 1110.29 dated October 27, 1988, and clarified by Secretary of Energy Notice SEN–10–89 dated August 3, 1989, and subsequent revisions, the Secretary of Energy delegated: (1) To the Administrator of the Western Area Power Administration (Western) the authority on a nonexclusive basis to develop power and transmission rates; (2) to the Deputy Secretary the authority on a nonexclusive basis to confirm, approve, and place in effect on an interim basis power and transmission rates; and (3) to the Federal Energy Regulatory Commission (FERC) the authority on an exclusive basis to confirm, approve, and place in effect on a final basis, to remand or to disapprove rates developed by the Administrator under the delegation. This rate order is issued pursuant to such delegations to the Administrator and the Deputy Secretary, and the procedures for public participation in power and transmission rate adjustments and extensions for the Alaska Power Administration, Southeastern Power Administration, Southwestern Power Administration, and Western at 10 CFR part 903, published at 50 FR 37835 on September 18, 1985, with corrections published at 50 FR 48075, November 21, 1985.

Background

Project History

Stampede Dam and Reservoir are located on the Little Truckee River approximately 8 miles above the confluence of the Little Truckee and Truckee Rivers. The dam and reservoir are in Sierra County, California, about 11 miles northeast of the town of Truckee. The water source for Stampede Reservoir is the Little Truckee River drainage basin containing about 136 square miles of densely wooded slopes and grass meadowlands.

When the Washoe Project was authorized in 1956, hydroelectric power development was included. However, power facilities were not constructed at the time Stampede Dam was built during the period 1966–1970 because the power function was not economically justified. Nevertheless, provisions were made to facilitate the addition of power facilities at a later date.

A preliminary reevaluation of a powerplant at Stampede Dam and Reservoir was published in a special Reclamation report, Adding Powerplants at Existing Federal Dams in California, July 1976. The report recommended construction of the Stampede Powerplant. As a result, definite plan studies were initiated in fiscal year 1977, and construction of the powerplant was completed in 1987.

Before the 3.65-megawatt powerplant was added, the operation of Stampede Dam and Reservoir was to fulfill three purposes: Flood control, fisheries enhancement, and recreation. Power generation will add a fourth purpose. The Stampede Powerplant is expected to provide approximately 10 million kilowatt hours (kWh) annually under average hydrologic conditions. The powerplant has means for maintaining only absolute minimum riverflow releases in the event of unit shutdown.

Under contract with Western, the Sierra Pacific Power Company (Sierra) constructed a ½-mile, 60-kilovolt transmission line between the Stampede power facility (Stampede) and Sierra's existing 60-kilovolt transmission system for the purpose of delivering energy to Sierra's system. Switchyard control is manual and is located in the switchyard.

The energy generated by the Stampede has an initial priority reservation for designated Washoe Project loads. The Lahontan National Fish Hatchery and the Marble Bluff Fish Facility have been designated by Reclamation and Western as project loads of the Washoe Project. This designation makes the Fish and Wildlife Service facilities eligible to be served by

Stampede cn a priority basis. The projected demand of these facilities should not exceed 500-kW peakload and 2 million kWh annually. Due to the present inability to receive Stampede energy, the designated project-use loads are not currently being service by Stampede.

Western's power marketing plan, approved on October 25, 1985, designated Truckee-Donner Public Utility District (Truckee-Donner) as the preference agency to receive the commercially available Stampede energy (50 FR 43456). Western established a 50-year levelized repayment rate of 40.45 mills per kWh or 27.86 mills per kWh plus annual operation and maintenance (O&M) responsibility. These rates were approved by FERC on February 10, 1987. From the time Stampede energy was allocated to Truckee-Donner until December 1988, Western attempted to negotiate a contract with Truckee-Donner, but was not successful because the Stampede levelized rate was above the region's nonfirm energy market levels. Presently, Stampede nonfirm energy is being sold to Sierra under a short-term agreement at 80 percent of their quarterly weighted marginal cost. In the spring of 1989, Western determined a need to create an alternate rate approach.

Power Rate Bidding Process

Under this rate order, Western is establishing an annual bidding process for Stampede nonfirm energy. Annual bids for Stampede generation will be considered only if they meet or exceed the minimum rate (or floor rate) Western considers necessary to meet the expense of operating the plant. Western will also calculate the conventional cost-based rate necessary to meet the Stampede repayment obligation. This rate will be considered the highest necessary bid (or the ceiling rate) for the Stampede energy. Western will annually issue a public notice in the appropriate publications in the region, as well as letters to customers and interested parties, to the effect that Stampede nonfirm energy is available to the highest bidder at a rate ranging between the established floor and ceiling rates contained in the public notice. Entities interested in purchasing the Stampede energy will submit bids to Western indicating the rate they are willing to pay with these parameters. The purchaser will pay for all Stampede nonfirm energy made available at the Stampede Powerplant Substation, except for the energy designated to service project-use loads.

The range of rates that Western will consider for Stampede nonfirm energy will be calculated annually. The Floor Rate will be based on the greater of either: (a) The rate necessary to recover the projected annual O&M expenses for Stampede plus 2 mills per kWh: or (b) 85 percent of the purchaser's projected average annual marginal energy cost as measured at its point of receipt for such energy. This proposal is intended to ensure that the plant will only be operated if there is an economic benefit to do so, and at the same time attempt to ensure the maximum reasonable revenue recovery by Stampede while still benefiting the purchaser. The floor rate for April 1, 1990, to September 30, 1990, based on O&M expenses plus 2 mills per kWh, is 19.12 mills per kWh.

The ceiling rate be the cost-based rate determined by Western to be necessary to repay the Stampede power investment and annual expenses over the remaining repayment period of the power facilities. The ceiling rate for April 1, 1990, to September 30, 1990, is 50.96 mills per kWh. It is expected that Stampede energy will be sold at a rate considerably below this ceiling rate during the initial years of operation. At some point in the future, it is expected that the region's alternative marginal energy costs will exceed the ceiling rate, and Western will be able to sell the energy at rates that will repay Stampede power costs within the 50-year period.

This Stampede Flexible annual rate formula will be in effect for 5 years, starting from the date that the rate is placed in effect. Western will retain the option of initiating a rate adjustment process at any time during the 5-year approved rate period in accordance with title 10, CFR part 903, provided that any such new or adjusted rates shall not apply to a then current purchaser for the remaining duration of its purchase from Stampede.

Western will report annually to FERC the basis for the floor rate, the ceiling rate, the status of Washoe Project repayment, and any decision not to operate the plant during a given period.

Public Notice

The procedures for public participation for rate adjustments, as set forth in title 10, CFR part 903, have been followed in the development of this rate. The following discussion summarizes the steps Western took to assure involvement of interested parties in the rate process:

1. On August 14, 1989, a **Federal Register** notice (54 FR 33285–33288) initiated the public proceedings for a minor service, announcing the proposed nonfirm energy rates and the beginning of the 30-day consultation and comment period.

2. On August 25, 1989, letters were sent to interested parties transmitting the **Federal Register** notice (54 FR 33285–33288, August 14, 1989).

3. A public information and comment forum was not held. Under DOE procedures, such forums are optional for power systems with installed capacity of less than 20,000 kilowatts. Stampede Powerplant capacity is 3,650 kilowatts, well under the 20,000-kilowatt limit, making the forums optional for Stampede. Western's decision not to hold public forums is primarily due to the absence of public interest and involvement in the rate-development proceedings.

4. The comment and consultation period ended September 14, 1989. Comments were received from Reclamation and Sierra.

Public Comments

Comments

Reclamation clarified the following points regarding the opertion of Stampede Powerplant:

1. The powerplant can maintain only minimum riverflow releases in the event of a unit shutdown;

2. Generator control is not automatic a Stampede Powerplant; and

3. Switchyard control is manual and is located in the switchyard.

Response

Western has modified the project background section to conform with these comments.

Comments

Reclamation also made the following two general comments regarding the proposed rates:

1. Reclamation stated that the authorizing legislation for the Washoe Project included generation and transmission of hydroelectric power as an original purpose.

2. Reclamation indicated that they were willing to accept the proposed rate design for the first 5 years that Stampede is operational.

Response

1. Western concurs that the authorizing legislation for Washoe Project included hydroelectric generation and transmission as indicated in the project background section.

2. Although Stampede's rates would be in effect beyond the first 5 years of operation, it is possible that a full cost

recovery rate could be achieved during that period.

Comments

By letter dated September 13, 1989, Sierra commented on four aspects of the proposed rates: wheeling for Stampede nonfirm energy; participants in the bidding process; calculation of the floor rate; and the recalculation of the floor rate to account for actual annual cost data.

1. Sierra states that any purchase by a party other than Sierra will require transmission from Sierra, and Sierra doubts that it will be able to provide such transmission service at all times that Stampede energy is available.

Response

1. Western recognizes that the Stampede is directly connected with the Sierra transmission system. Therefore, Western placed a condition in its rate proposal that specified that any prospective purchaser is responsible for obtaining transmission services necessary to obtain the Stampede energy.

Comments

2. Sierra commented that the participants in the bidding process are not identified.

Response

2. Any entity that is interested in purchasing Stampede nonfirm energy can participate in the bidding process.

Comments

3. Sierra states that the proposed floor rate artificially increases the Stampede energy rate above market levels for no apparent reason.

Response

3. Sierra has presented the only market to date for Stampede energy. Sierra has agreed to pay only 80 percent of its projected quarterly weighted marginal energy cost for this energy. Western has sold Stampede energy to Sierra at this price under short-term contracts because it was not able to market Stampede energy at the FERC-approved fully allocated cost rate. The purpose of this rate proposal is to allow Western the flexibility to sell Stampede energy below the fully allocated cost rate. Sierra appears to be stating that whatever they decide to pay for Stampede energy determines the market value for such energy. From Western's point of view, we are proposing that the Stampede energy be sold at a minimum for what it costs to operate the plant plus a slight margin (2 mills per kWh) to repay a small portion of the annual interest expense. We are also stating that if a utility can purchase this energy at 15 percent below its average annual marginal energy cost (which means that Stampede energy is priced below any other source of energy) and this happens to be greater than the O&M-based floor rate, that a utility should be willing to pay such a rate for the energy. There is no attempt to set a rate above the market cost of a prospective purchaser which is represented by the marginal cost of the purchaser. The only purpose of this rate proposal is to minimize economic loss to the U.S. Government, while continuing to provide a benefit to any prospective purchaser of the energy.

Comments

4. Sierra's final comment concerns the recalculation of the floor rate based on actual annual cost data. Sierra's position is that price is determined at the time of the transaction and the recalculation is a departure from market-based rates.

Response

4. The floor rate will be recalculated to verify that the Stampede energy purchases were in fact made at 85 percent of the bidder's actual marginal cost for the year. This requirement will tie the floor rate to the purchaser's actual marginal costs, which reflect actual market conditions. If this condition were not present, and the marginal cost for energy were unexpectedly high, then a windfall would accrue to the purchaser due to inadvertently low marginal cost projections. This true-up mechanism ensures that Stampede energy will be purchased at only 15 percent below the market represented by the actual annual marginal cost experienced by the purchaser.

Certification of Rates

Western transmits and disposes of power and energy in such a manner as to encourage the most widespread use thereof at the lowest possible rates consistent with sound business principles. With these power rates in effect, the Administrator has certified that the Stampede Division, Washoe Project, power rates are the lowest possible rates consistent with sound business principles. Rates have been developed in accordance with administrative policies and applicable laws.

Environmental Evaluation

In compliance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et. seq.*, and DOE regulations published in the **Federal Register** (45 FR 20694–20701, March 28, 1986, as amended), Western has reviewed the environmental impacts of the power rate for the Stampede Division, Washoe Project, and has determined that it clearly does not involve a major Federal action having a significant adverse impact on the human environment. The preparation of an environmental assessment or environmental impact statement is not required.

Executive Order 12291

DOE has determined that this is not a major rule within the meaning of the criteria of section 1(b) of Executive Order 12291. In addition, Western has received an exemption for sections 3, 4, and 7 of that order and, therefore, will not prepare a regulatory impact statement.

Availability of Information

All studies, comments, letters, memorandums, and other documents made or kept by Western for the purpose of developing the power rates are and will be available for inspection and copying at the Sacramento Area Office, Western Area Power Administration, 1825 Bell Street, Suite 105, Sacramento, California 95825.

Submission to FERC

The rates herein confirmed, approved, and placed in effect on an interim basis, together with supporting documents, will be submitted to the FERC for confirmation and approval on a final basis.

Order

In view of the foregoing and pursuant to the authority delegated to me by the Secretary of Energy, I hereby confirm and approve on an interim basis, effective April 1, 1990, Rate Schedule SNF–3. This rate shall remain in effect on an interim basis pending the FERC confirmation and approval of it or substitute rates, on a final basis, or until it is superseded.

Issued at Washington, DC, March 28, 1990.

W. Henson Moore,

Deputy Secretary.

[Schedule SNF–3; Supersedes SNF–1 and SNF–2]

Stampede Division, Washoe Project; Rate Schedule for Wholesale Nonfirm Power Service

Effective: April 1, 1990.

Available: In the area served by the Stampede Division.

Applicable: to wholesale nonfirm power customers for general power service supplied through 1 meter at one

point of delivery, unless otherwise provided by contract.

Character and Conditions of Service: Alternating current, 60-hertz, three-phase, delivered and metered at the voltages and points established by contract.

Monthly Rate:

Demand Charge: None.

Energy Charge: Nonfirm energy from the Stampede Division, Washoe Project (Stampede) will be sold through an annual bidding process. Annual bids for Stampede generation will be considered only if they meet or exceed the minimum rate (or floor rate) the Western Area Power Administration (Western) considers necessary to meet the expense of operating the plant. Western will also calculate the conventional cost-based rate necessary to meet the Stampede repayment obligation. This rate will be considered the highest necessary bid (or ceiling rate) for the Stampede energy. The range of rates that Western will consider for stampede nonfirm energy will be calculated annually. Western will annually issue a public notice in the appropriate publications in the region, as well as letters to customers and interested parties, to the effect that Stampede nonfirm energy is available to the highest bidder at a rate ranging between the established floor and ceiling rates contained in the public notice. Entities interested in purchasing the Stampede energy will submit bids to Western indicating the rate they are willing to pay within these parameters. The purchaser will pay for all Stampede nonfirm energy made available at the Stampede Powerplant Substation, except for any energy designated to service project-use loads.

Within 120 days of the termination of any annual Stampede energy sale, a recalculation of floor rate will be made based on actual annual cost data. The purchaser will be required to supply an analysis verifying that the Stampede energy purchases were made at or above 85 percent of the purchaser's actual experienced marginal cost for the year. If the Stampede energy purchases were not at or above the actual annual floor rate, then the purchaser shall compensate Western for such difference in a lump sum payment that will be billing to the purchaser by Western.

Minimum Bill: None.

Adjustments: None. Stampede power will be delivered to the customer at the Stampede Powerplant Substation.

[FR Doc. 90-9228 Filed 4-19-90; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-3757-3]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared April 2, 1990 through April 6, 1990 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 382-5076.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 13, 1990.

Draft EISs

ERP No. D-FAA-J51009-UT, Rating EC2, Halls Crossing Airport Facility Replacement, Airport Layout Plan, Construction and Operation, Approval and Funding, San Juan County, UT.

Summary

EPA recommended that the final EIS discuss in more detail the noise impacts on the Glen Canyon National Recreational Area (GCNRA) and specific mitigation that will be implemented to reduce/avoid the impacts.

EPA expressed concerns about the underlying premise to locate a new airport adjacent, but outside the boundaries of the GCNRA.

ERP No. DS-FHW-F40291-IL, Rating EC2, Elgin-O'Hare Highway/FAP Route 426 Improvement, U.S. 20/Lake Street and Lovell Road to the proposed West O'Hare Expressway near York Road and Thorndale Avenue, Terminus Change, Funding and section 404 Permit, Cook and Dupage Counties, IL.

Summary

EPA expressed concern about wetland impacts associated with secondary development, air quality and noise impacts. EPA does not believe that the full range of environmental impacts associated with the project were adequately described.

Final EISs

ERP No. F-AFS-G65049-00, Ozark/Ouachita Mountains Vegetation Management Plan, Implementation, Ouachita, Ozark asnd St. Francis National Forests, AR and McCurtain and LeFlore Counties, OK.

Summary

EPA has no objections to the selected alternative with proper implementation of the mitigation as proposed.

ERP No. F-AFS-J28015-CO, Rock Creek Reservoir, Routt National Forest or Muddy Creek Reservoir, Kremmling Resource Area, Construction, Special Use and 404 Permits, Routt and Grand Counties, CO.

Summary

EPA expressed concerns about the procedure used by BLM to determine the project's impact to wetlands and the resultant inadequacy of the proposed wetland mitigation plan.

Dated: April 17, 1990.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 90-9197 Filed 4-19-90; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-3757-4]

Environmental Impact Statements; Availability

Responsible Agency: Office of Federal Activities, General Information (202) 382-5073 or (202) 382-5075.

Availability of Environmental Impact Statements Filed April 9, 1990 Through April 13, 1990 Pursuant to 40 CFR 1506.9.

EIS No. 900117, Draft, FHW, WI, MN, Stillwater-Houlton Transportation System MN-Trunk Highway-36 and WI-Trunk Highway-64 Improvements, MN-Trunk Highway-36 and Washington County State Aid Highway-15 to MN-Trunk Highway-64 and St. Croix River Bridge, Funding, U.S. CGB Bridge Permit, COE section 10 and 404 Permits, St. Croix, WI and Washington County, MN, Due: June 8, 1990, Contact: Alan Friesen (612) 290-3236.

EIS No. 900118, Final, COE, WV, Petersburg Local Flood Protection Plan, Implementation, Grant County, WV, Due: May 21, 1990, Contact: J. William Haines (301) 962-8154.

EIS No. 900119, Final, COE, IL, O'Hara System Flood Control Reservoir Project, Chicagoland Underflow Plan, Implementation, Cook County, IL, Due: May 21, 1990, Contact: Rose Austin (312) 353-7795.

EIS No. 900120, FSuppl, COE, FL, Brevard County Beach Erosion Control Project, Canaveral Harbor Sand Bypass System, Renouishment and Sand Transfer Plant Construction, Brevard County, IL, Due: May 21, 1990, Contact: Gerald Atmar (904) 791-2615.

EIS No. 900121, Draft, BLM, MT, Blackleaf Unit Oil and Gas

Exploration and Development, Implementation, Great Falls Resource Area, Rocky Mountain Front, Teton County, MT, Due: July 20, 1990, Contact: Doug Berger (406) 727–0503.

EIS No. 900122, Draft, AFS, ID, Mallard Creek Timber Sale and Road Construction, Implementation, Nez Perce National Forest, Red River Ranger District, Idaho County, ID, Due: June 4, 1990, Contact: Mark Peterson (208) 842–2255.

EIS No. 900123, Draft, USN, CA, San Diego Navy Broadway Complex Redevelopment, Implementation, CA, Due: June 4, 1990, Contact: Bill Robinson (619) 532–3291.

EIS No. 900124, Draft, AFS, IN, Hoosier National Forest Land and Resource Management Plan Amendment, Implementation, Several Counties, IN, Due: July 30, 1990, Contact: Francis J. Voytas (812) 275–5987.

Dated: April 17, 1990.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 90–9198 Filed 4–19–90; 8:45 am]

BILLING CODE 6560–50–M

[OPP–30000/53E; FRL 3738–3]

Reopening of Public Comment Period on Notice of Preliminary Determination to Cancel Certain Registrations of Pesticide Products Containing Ethylene Bisdithiocarbamates and Correction of Table

AGENCY: Environmental Protection Agency (EPA).

ACTION: Reopening of comment period and correction of table.

SUMMARY: On December 20, 1989, the EPA published its preliminary determination regarding the continued registration of pesticide products containing ethylene bisdithiocarbamate (EBDCs) which included the Agency's assessment of the risks and benefits associated with EBDC pesticides (54 FR 52158). That Notice stated that written comments must be received by EPA on or before March 20, 1990 or 90 days after a registrant received a copy of the Notice, whichever was later. The Environmental Protection Agency has received requests from registrants, agricultural trade associations, individual growers, and other interested parties to extend the comment period in order to provide EPA with data to be considered in its final determination on EBDC pesticides. After considering those requests, EPA has decided to reopen the comment period only for those sites where there has been interest expressed in retaining and supporting the registration of that use. The **SUPPLEMENTARY INFORMATION** section of this notice specifies the uses for which the comment period will be reopened and extended as well as those for which it will not be reopened and extended, and describes the conditions of the reopening and extension. In addition, the Agency has become aware that there was an error in the printing of Table 1—ETU Dietary Carcinogenic Risk Estimates from the Use of EBDC Pesticides in the December 20, 1989 **Federal Register** Notice. A corrected version of that table is set forth in the **SUPPLEMENTARY INFORMATION** section of this notice.

ADDRESSES: Submit three copies of written comments, bearing the document control number "OPP–30000/53E" by mail to: Public Docket and Freedom of Information Section, Field Operations Division (H7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person bring comments to: Rm. 246, CM # 2, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted in any comment concerning this Notice or the Notice published at 54 FR 52158 may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked CBI may be publicly disclosed by EPA without prior notice to the submitter. The EBDC docket, which contains all non-CBI written comments and the correspondence index, will be available for public inspection and copying in Rm. 246 at the Virginia address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Janet L. Andersen, Special Review Branch, Special Review and Reregistration Division (H7508C), Office of Pesticide Programs, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 1006, CM # 2, 1921 Jefferson Davis Highway, Arlington, VA. 22202, (703–557–7400).

SUPPLEMENTARY INFORMATION: On December 20, 1989, EPA published the preliminary determination on EBDC pesticides and the EPA's assessment of the risks and benefits associated with EBDC pesticides (54 FR 52158). In that Notice, EPA proposed to cancel all uses of zineb, 45 of the 55 food uses of mancozeb, maneb, and metiram, maneb use on commercial ornamentals, all homeowner uses of maneb, homeowner uses of mancozeb on fruit trees and turf, and nabam use in sugar and pulp/paper mills. EPA also proposed protective clothing requirements for commercial agricultural workers and for homeowners applying EBDC pesticides. In addition, EPA proposed a 24–hour interim reentry period for all EBDC products used on agricultural sites. The December 20 **Federal Register** Notice provided a 90–day public comment period which would close on March 20, 1990 or 90 days after an EBDC registrant received a copy of the Notice, whichever was later. The Agency has received requests from registrants, agricultural trade associations, individual growers, and other interested parties to extend the public comment period to enable these parties to submit benefits data, usage data, risk reduction measures information, and/or residue data supporting particular crops. EPA determined the crops for which there was an interest in extending the comment period by noting the crops supported in the public comments received in response to the December 20, 1989 **Federal Register** Notice and/or the crops supported by the EBDC technical registrants through their market basket survey required under the March 10, 1989 Data Call-In Notice.

I. Uses for Which the Comment Period Has Been Reopened and Conditions of Its Reopening

EPA has decided to reopen and extend the comment period for all food crop uses in which one or more commenters expressed an interest in supporting the continued use of EBDCs. These uses are the following 48 of the 55 food uses of mancozeb, maneb, and/or metiram which were included in the EPA's preliminary determination regarding the continued registration of pesticide products containing EBDCs: almonds, apples, asparagus, bananas, barley, beans, broccoli, Brussels sprouts, cabbage, cantaloupe, carrots, casaba melons, cauliflower, celery, collards, cotton, crabapples/quince, cranberries, crenshaw melons, cucumbers, eggplant, endive, field corn, grapes, honeydew melons, kale, kohlrabi, lettuce, lima beans, mustard greens, oats, onions, papaya, peanuts, pears, pecans, peppers, potatoes, pumpkins, rye, spinach, squash, sugar beets, sweet (and pop) corn, tomatoes, turnips, watermelon, and wheat. The dietary risk assessment in the PD 2/3 included pop corn with

sweet corn although this was not specifically stated in the **Federal Register** Notice. The comment period will be reopened and extended to June 30, 1990 for submission of any data existing as of that date and to September 30, 1990 for any comments and new data being generated to support registration of mancozeb, maneb, and metiram on these 48 crops.

II. Uses for Which the Comment Period Has Not Been Reopened

The uses for which the public comment period is not being reopened or extended are: all zineb uses; all uses of nabam; maneb use on apricots, figs, nectarines, peaches, rhubarb, and ornamental crops; mancozeb use on caprifigs, fennel, pineapple, and ornamental crops; and metiram use on roses.

III. Correction

Table 1—ETU Dietary Carcinogenic Risk Estimates from the use of EBDC Pesticides in 54 FR 52158 was printed in error. The following is a corrected version of that table.

TABLE 1—ETU DIETARY CARCINOGENIC RISK ESTIMATES FROM THE USE OF EBDC PESTICIDES

Chemical	Parent Exp.	In Vivo ETU Exp	In Vivo Risk	Direct ETU Exp	Direct Risk	Total Risk
Mancozeb	.00089	.000067	4.0E-05	.000091	5.5E-05	9.5E-05
Maneb	.00132	.000099	6.0E-05	.00034	2.0E-04	2.6E-04
Metiram	.00017	.000013	7.7E-06	.000044	2.7E-05	3.5E-05
Totals			1.1E-04		2.9E-04	4.0E-04

Dated: April 16, 1990.

Victor J. Kimm,

Acting Assistant Administrator for Pesticides and Toxic Substances.

[FR Doc. 90-9223 Filed 4-19-90; 8:45 am]

BILLING CODE 6560-50-D

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10220. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-010631-004.

Title: Port of Oakland/Hanjin Shipping Company, Ltd. Terminal Agreement.

Parties: Port of Oakland, Hanjin Shipping Company, Ltd.

Synopsis: The Agreement extends the term of the basic agreement to December 31, 1990, subject to earlier termination if the parties enter into a new agreement covering use of another facility.

By Order of the Federal Maritime Commission.

Dated: April 16, 1990.

Joseph C. Polking,

Secretary.

[FR Doc. 90-9134 Filed 4-19-90; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

Agency Forms Under Review

April 16, 1990.

Background

Notice is hereby given of final approval of proposed information collection(s) by the Board of Governors of the Federal Reserve System (Board) under OMB delegated authority, as per 5 CFR 1320.9 (OMB Regulation on Controlling Paperwork Burdens on the Public).

FOR FURTHER INFORMATION CONTACT:

Federal Reserve Boad Clearance Officer—Frederick J. Schroeder—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202-452-3822).

OMB Desk Officer—Gary Waxman—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, room 3208, Washington, DC 20503 (202-395-7340).

Final approval under OMB delegated authority of the extension, without revision, of the following report:

Report title: Senior Financial Officer Survey.

Agency form number: FR 2023.

OMB Docket number: 7100-0223.

Frequency: Up to four times per year.

Reporters: Commercial banks, other depository institutions, corporations or large money-stock holders.

Annual reporting hours: 240.

Average hours per response: 1.0.

Estimated number of respondents: 60.

Small businesses are not affected.

General description of report:

This information collection is voluntary [12 U.S.C. 225, 248(a) and 263] and the confidentiality will be determined on a case-by-case basis.

The survey collects qualitative information about deposit relationships and other aspects of bank funding practices from a selection of commercial banks, or if appropriate, other depository institutions, corporations or large money-stock holders. The survey assists the Federal Reserve in its assessment of the monetary aggregate and financial market conditions.

Board of Governors of the Federal Reserve System, April 16, 1990

William W. Wiles,

Secretary of the Board.

[FR Doc. 90-9176 Filed 4-19-90; 8:45 am]

BILLING CODE 6210-01-M

BB&T Financial Corp. et al.; Acquisitions of Companies Engaged in Permissible Nonbanking Activities

The organizations listed in this notice have applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated for the application or the offices of the Board of Governors not later than May 11, 1990.

A. **Federal Reserve Bank of Richmond** (Lloyd W. Bostian, Jr., Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. *BB&T Financial Corporation*, Wilson, North Carolina, to acquire Carolina Bancorp, Inc., and its subsidiary, First Federal of the Carolinas, F.A., High Point, North Carolina, and thereby engage in the traditional deposit taking and loan making activities performed by a savings bank. These activities will conform to only those permitted for bank holding companies under the FIRREA rules, pursuant to § 225.25(b)(9) of the Board's Regulation Y.

2. *Premier Bankshares Corporation*, Tazewell, Virginia; to acquire Professional Financial Services of Virginia, Inc., Shawsville, Virginia, and thereby engage in providing data processing services to the public at large pursuant to written agreements, the services include the preparation of unaudited financial statements (bookkeeping) and payroll/payroll tax computations; providing income tax planning and income tax return preparation for individuals and small businesses; providing consumer financial counseling to individuals, said counseling includes retirement planning, education financing, estate planning, budgeting, and tax planning, pursuant to §§ 225.25(b)(7), (20), and (21) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, April 16, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-9177 Filed 4-19-90; 8:45 am]

BILLING CODE 6210-01-M

First National Bancorporation of Ennis, Inc. Employee Stock Ownership Plan & Trust, et al.; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the reserve Bank indicated for that notice or to the offices of the Board of Governors. comments must be received not later than May 11, 1990.

A. **Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *First National Bancorporation of Ennis, Inc. Employee Stock Ownership Plan & Trust*, Ennis, Texas, to acquire 16.52 percent of the voting shares of First National Bancorporation of Ennis, Inc., Ennis, Texas, and thereby indirectly acquire First National Bank of Ennis, Ennis, Texas.

B. **Federal Reserve Bank of San Francisco** (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. *Capital City Bank employee Stock Ownership Plan.* Salt Lake City, Utah; to acquire 5.45 percent of the voting shares of Capital Bankcorp, Salt Lake City, Utah, and thereby indirectly acquire Capital Bank, Salt Lake City, Utah.

Board of Governors of the Federal Reserve System, April 16, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-9178 Filed 4-19-90; 8:45 am]

BILLING CODE 6210-01-M

Premier Bankshares Corp. et al.; Formation of, Acquisition by, or Merger of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than May 11, 1990.

A. **Federal Reserve Bank of Richmond** (Lloyd W. Bostian, Jr., Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. *Premier Bankshares Corporation*, Tazewell, Virginia; to acquire 100 percent of the voting shares of Shawsville Bancorp, Inc., Shawsville, Virginia, and thereby indirectly acquire Bank of Shawsville, Shawsville, Virginia.

B. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *E & A Associates*, Denver, Colorado; to become a bank holding company by acquiring 100 percent of the voting shares of First Denver Corporation, Denver, Colorado, parent of The First National Bank of Denver, Denver, Colorado. Comments regarding this application must be received not later than May 16, 1990.

Board of Governors of the Federal Reserve System, April 16, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-9179 Filed 4-19-90; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

Public Information Collection Requirements Submitted to the Office of Management and Budget for Clearance

AGENCY: Health Care Financing Administration, HHS.

The Department of Health and Human Services (HHS) previously published a list of information collection packages it submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (Pub. L. 96–511). The Health Care Financing Administration (HCFA), a component of HHS, now publishes its own notices as the information collection requirements are submitted to OMB. The HCFA has submitted the following requirements to OMB since the last HCFA list was published on February 5, 1990.

1. *Type of Request:* Extension; *Title of Information Collection:* Statistical Report on Medical Care: Eligibles, Recipients, Payments, and Services; *Form Number:* HCFA–2082; *Frequency:* Annually; *Respondents:* Individuals/households, State/local governments; *Estimated Number of Responses:* 51; *Average Hours per Response:* 512.27; *Total Estimated Burden Hours:* 26,126.

2. *Type of Request:* Revision; *Title of Information Collection:* Survey of Private Health Insurance; *Form Number:* HCFA–1807; *Frequency:* Annually; *Respondents:* Businesses/other for profit, Federal agencies/employees, non-profit institutions, and small businesses/organizations; *Estimated Number of Responses:* 8,820; *Average Hours per Response:* .31; *Total Estimated Burden Hours:* 2,734.

Additional Information or Comments: Call the Reports Clearance Officer on 301–966–2088 for copies of the clearance request packages. Written comments and recommendations for the proposed information collections should be sent directly to the following address: OMB Reports Management Branch, Attention: Allison Herron, New Executive Office Building, Room 3208, Washington, DC 20503.

Dated: March 2, 1990.

Gail R. Wilensky,

Administrator, Health Care Financing Administration.

[FR Doc. 90–9209 Filed 4–19–90; 8:45 am]

BILLING CODE 4120–03–M

National Institutes of Health

Establishment of Biological and Clinical Aging Review Committee et al.

Pursuant to the Federal Advisory Committee Act of October 6, 1972 [Pub. L. 92–463, 86 Stat. 770–776] and section 402(b)(6), of the Public Health Service Act, as amended [42 U.S. Code 282(B)(6)], the Acting Director, National Institutes of Health (NIH), announces the establishment of the following committees:

Biological and Clinical Aging Review Committee

Neuroscience, Behavior and Sociology of Aging Review Committee

Genome Study Section

Medical Biochemistry Study Section

The Gerontology and Geriatrics Review Committee was divided and restructured to form the Biological and Clinical Aging and the Neuroscience, Behavior and Sociology of Aging Review Committees. The Biochemistry Study Section was restructured and part of its responsibilities were transferred to the newly formed Medical Biochemistry Study Section.

The Biological and Clinical Aging Review Committee will provide review of research concerned with aging at the molecular, cellular, tissue, organ and clinical level in all biomedical areas expect the neurosciences and behavior. The Neuroscience, Behavior and Sociology of Aging Review Committee will provide review of research concerned with aging in the nervous systems, behavioral, and social sciences.

The Genome Study Section will review the broad areas of research relevant to characterization of the genome of the human and of model organisms.

The Medical Biochemistry Study Section, formerly a subcommittee of the Biochemistry Study Section, will review research dealing with the broad areas of biochemistry, primarily addressing biomedical research that is concerned with the biochemical events occurring in pathophsiological states in humans.

Duration of these committees is continuing unless formally determined by the Director, NIH, that termination would be in the best public interest.

Dated: April 13, 1990.

William F. Raub,

Acting Director, National Institutes of Health.

[FR Doc. 90–9163 Filed 4–19–90; 8:45 am]

BILLING CODE 4140–01–M

Social Security Administration

Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Social Security Administration publishes a list of information collection packages that have been submitted to the Office of Management and Budget (OMB) for clearance in compliance with Public Law 96–511, The Paperwork Reduction Act. The following clearance packages have been submitted to OMB since the last list was published in the **Federal Register** on March 30, 1990.

Social Security Administration

Call Reports Clearance Officer on (301) 965–4149 for copies of package.

1. Self-Employment/Corporate Officer Questionnaire—0960–NEW—The information collected on the form SSA–4184 will be used by the Social Security Administration to develop the earnings or substantiate the allegation of retirement of a claimant who is self-employed or the officer of a corporation. The respondents are such claimants who need the additional evidence supplied by this form to substantiate their allegations.

Number of Respondents: 50,000
Frequency of Response: 1
Average Burden Per Response: 10 minutes
Estimated Annual Burden: 8,333 hours

2. Report On Individual With Childhood Impairment—0960–0084—The information collected on the form SSA–1323 is used by the Social Security Administration to determine the dates and results of psychometric testing and to assess the effects on scholastic progress of an individual's impairment(s). The affected public is comprised of public and private school officials.

Number of Respondents: 7,000
Frequency of Response: 1
Average Burden Per Response: 20 minutes
Estimated Annual Burden: 2,333 hours

3. Letter To Landlord Requesting Rental—0960–0454—The information collected on the form SSA–L5061 is used by the Social Security Administration to determine if a rental subsidy agreement exists between a landlord and an applicant for or a recipient of Supplemental Security Income payments. Respondents are landlords who may be subsidizing a rental agreement.

Number of Respondents: 36,000
Frequency of Response: 1

Average Burden Per Response: 10 minutes

Estimated Annual Burden: 6,000 hours

OMB Desk Officer: Allison Herron.

Written comments and recommendations regarding these information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address:

OMB Reports Management Branch, New Executive Office Building, room 3208, Washington, DC 20503.

Dated: April 10, 1990.

Ron Compston,

Social Security Administration, Reports Clearance Officer.

[FR Doc. 90-8755 Filed 4-19-90; 8:45 am]

BILLING CODE 4190-11-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO-010-00-4320-02]

Craig Colorado Advisory Council Meeting

Time and Date: May 23, 1990, at 10 a.m.

Place: BLM—Craig District Office, 455 Emerson Street, Craig, Colorado.

Status: Open to public; interested persons may make oral statements at 10:30 a.m. Summary minutes of the meeting will be maintained in the Craig District Office.

Matters To Be Considered:

1. "State of the Public Rangelands 1990"
2. Off-highway Vehicle (OHV) Legislation
3. Wilderness Environmental Impact Statement
4. Trans Colorado Gas Transmission Natural Gas Pipeline

Contact Person for More Information: Mary Pressley, Craig District Office, 455 Emerson Street, Craig, Colorado 81625-1129, Phone: (303) 824-8261.

Dated: April 12, 1990.

David C. Nylander,

Acting District Manager.

[FR Doc. 90-9180 Filed 4-19-90; 8:45 am]

BILLING CODE 4310-JB-M●

[WY-930-00-4212-12; WYW 114131]

Conveyance and Opening Order; Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of exchange of public land in Crook and Weston Counties for State land in Johnson County and order providing for opening of public land.

SUMMARY: This notice advises the public of completion of an exchange of land between the United States, Bureau of Land Management, and the State of Wyoming under the authority of section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1716. The order opens the land acquired by the United States to operation of the public land laws.

EFFECTIVE DATE: April 30, 1990, 9:30 a.m.

FOR FURTHER INFORMATION CONTACT: Jon Johnson, BLM Wyoming State Office, P.O. Box 1828, 2515 Warren Avenue, Cheyenne, Wyoming 82001, 307-772-2074.

SUPPLEMENTARY INFORMATION: 1. The following Federal land, surface estate only, has been conveyed to the State of Wyoming:

Sixth Principal Meridian

T. 47 N., R. 60 W.,
Sec. 15, lots 5, 6, and 7;
Sec. 21, NW¼NW¼.
T. 48 N., R. 60 W.,
Sec. 15, lots 5, 6, 7, and 8;
Sec. 17, lot 5;
Sec. 22, lots 5, 6, and 7.
T. 46 N., R. 62 W.,
Sec. 23, SW¼NE¼ and SE¼NW¼;
Sec. 25, NW¼;
Sec. 27, NE¼SE¼.
T. 54 N., R. 66 W.,
Sec. 25, SW¼SW¼;
Sec. 26, S½SE¼;
Sec. 35, N½NE¼.

The land described contains 901.68 acres.

The above described land was segregated from appropriation under the mining laws by publication of Notice of Realty Action WYW 114131 in the **Federal Register** on December 30, 1988 (53 FR 53076). The segregative effect of that notice terminated on March 27, 1990.

2. In exchange for the land described in paragraph 1, the United States acquired the following non-Federal land from the State of Wyoming:

Sixth Principal Meridian

T. 42 N., R. 84 W.,
Sec. 21, S½;
Sec. 22, NE¼, S½NW¼, SW¼, and NW¼SE¼;
Sec. 23, NW¼NE¼ and N½NW¼.

The land described contains 880.00 acres.

All minerals in the above land are owned by the United States and have been and remain open to operation of the mining, mineral leasing, and mineral material laws.

3. The fair market value of the Federal land conveyed to the State of Wyoming is $103,000 and that of the non-Federal land acquired by the United States is $101,000. Pursuant to section 9 of the Federal Land Exchange Facilitation Act of 1988, the authorized officer of the Bureau of Land Management has waived cash equalization payment of $2,000 by the State of Wyoming.

4. At 9:30 a.m. on April 30, 1990, the land described in paragraph 2 shall be open to operation of the public land laws, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 9:30 a.m. on April 30, 1990, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

John A. Naylor,

Chief, Branch of Land Resources.

Dated: April 12, 1990.

[FR Doc. 90-9185 Filed 4-19-90; 8:45 am]

BILLING CODE 4310-22-M

National Park Service

Antietam National Battlefield, Maryland, General Management Plan/ Environmental Impact Statement

AGENCY: National Park Service (Interior).

ACTION: Notice of environmental scoping meeting and extension of comment period.

SUMMARY: Pursuant to Council on Environment Quality regulations and National Park Service policy, the National Park Service (NPS) announces a scoping meeting to invite public participation in the development and analysis of alternatives to be considered and analyzed in the General Management Plan/Draft Environmental Impact Statement (GMP/EIS) for Antietam National Battlefield, Maryland. The final GMP will guide the management, operation, and use of the battlefield for the next 20 years.

On March 6, 1990, the National Park Service published a notice of intent to prepare an Environmental Impact Statement. Prior to that time, a series of meetings had been held to develop the preliminary issues and alternatives to be addressed in the draft EIS.

On March 3, 1990, a public hearing was held from 9 a.m. until 8 p.m. at Boonsboro High School, Boonsboro, Maryland. A workshop format was used to provide citizens with the opportunity to ask questions and voice concern on a one-to-one basis with representatives from the NPS about the three alternatives presented in the scoping document. Approximately 200 people attended the public hearing, with 66 percent providing either written or oral comments. Twenty-five individuals objected to the format of the public

hearing and refused to testify. These individuals indicated their willingness to testify at an open-mike public hearing.

At the request of some members of the public, and in order to assure that all of these issues, impacts, and alternatives are sufficiently considered, an additional public hearing will be conducted as a part of the continuing scoping process. The purpose of this public hearing is to solicit additional comments in either written or oral form. The first half-hour of the hearing will consist of an orientation to the issues, impacts and alternatives already identified, with the remaining 3 hours devoted to receiving public comment and responding to questions. Court reporters wil be present to record oral testimony. lection officials will be heard first, followed by group representatives, and then individuals. The balance of time after the completion of individual testimony will be devoted to answering questions. Oral presentations will be limited by the available time and the number who sign in. Approximately 5 minutes will be allocated per individual at the beginning of the public hearing. The public hearing will be moderated by an Administrative Law Judge whose responsibilities will be to regulate the course of the public hearing and to deal with procedural requests, objections, and comparable matters. Although the presiding officer is an Administrative Law Judge, the proceeding is informal in nature. In the interest of due process, fairness, and the development of a complete public hearing record, those wishing to testify will be asked to sign in outside of the Auditorium. Individuals may submit copies of their testimony in writing.

Because there may not be sufficient time to answer all questions after individual testimony, the process would be facilitated by having questions submitted in writing 10 days in advance of the hearing to the Superintendent, Antietam National Battlefield, P.O. Box 158, Sharpsburg, MD 21782. To the extent possible, answers to the questions will be available in writing on the evening of the public hearing.

DATES: The hearing will be conducted on May 22, 1990, in the Boonsboro High School Auditorium, Boonsboro, Maryland, from 7:30 p.m. to 11 p.m. For those unable to attend the hearing, written comments and suggestions for analysis in the GMP/EIS must be received by June 6, 1990. Persons who have previously submitted comments during the preliminary meetings need not resubmit comments in order to have them considered during the further development of the draft GMP/EIS.

Copies of the scoping document and background information can be obtained by writing the Superintendent, Antietam National Battlefield, P.O. Box 158, Sharpsburg, MD 21782.

SUPPLEMENTARY INFORMATION: With the provision of this additional meeting, the Draft GMP/EIS is now expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by fall 1990. At that time EPA will publish a notice of availability of the draft GMP/EIS in the **Federal Register**

The comment period on the draft will be 60 days from the date the notice of availability appears in the **Federal Register**. It is very important that those interested in the draft participate at that time. To be most helpful, comments should be as specific as possible.

After the comment period ends on the draft, the comments will be analyzed and considered in preparing the final EIS. The final EIS is now scheduled to be completed by early 1991. In the final GMP/EIS, the NPS is required to respond to the comments received (40 CFR 1502.4). The responsible official will consider the comments, responses, environmental consequences discussed in the final EIS, and applicable laws, regulations and policies in making a decision regarding this proposed GMP. The responsible official will document the decisions and reasons for the decision in the Record of Decision. The responsible official is Robert Stanton, Regional Director, National Capital Region, National Park Service, Washington, DC.

Dated: April 17, 1990.

Ronald N. Waye,

Regional Director, National Capital Region.

[FR Doc. 90-9239 Filed 4-19-90; 8:45 am]

BILLING CODE 4310-70-M

Bureau of Reclamation

Central Valley Project California; Realty Action Competitive Sale of Federal Land

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of realty action.

SUMMARY: The following described tracts of land have been identified for disposal under the Act of February 2, 1911 (36 Stat. 895, 43 U.S.C. 374), at no less than the appraised fair market value. The Bureau of Reclamation will accept bids on the land described below and will reject any bids for less than the appraised value as listed below:

Unit No. T-RD-3:

Parcel 1—4.00 acres—$8,400
Parcel 2—0.87 acre—$2,100

Unit No. LC-2:

Parcel A—5.2 acres—$27,000
Parcel B—28.3 acres—$49,000

DATES: June 20, 1990.

FOR FURTHER INFORMATION CONTACT: Gerald R. Frye, Bureau of Reclamation, Shasta Dam Visitor Center, Redding, CA 96003; telephone (916) 275-1554.

SUPPLEMENTARY INFORMATION:

Unit No. T-RD-3

Two parcels of land (Parcel 1-4.00 acres; Parcel 2-0.87 acre) located in section Seventeen (17), Township Thirty-three (33) North, Range Eight (8) West, Mount Diablo Meridian, Trinity County, California, containing a total of 4.87 acres, more or less.

Unit No. LC-2

Two parcels of land—Parcel A-5.2 acres located in section Twenty (20), Township Thirty-three (33) North, Range Eight (8) West, Mount Diablo Meridian; Parcel B-28.3 acres located in section Nineteen (19), Township Thirty-three (33) North, Range Eight (8) West, Mount Diablo Meridian, Trinity County, California, containing a total of 33.5 acres, more or less.

The land will be offered for sale through the competitive bidding process. A sealed bid sale will be held at the Bureau of Reclamation office at the Shasta Dam Visitor Center, 16 miles north of Redding, CA on June 20, 1990, at which time the sealed bids will be opened. Sealed bids will be accepted at the Shasta Office until close of business on June 19, 1990. Reclamation may accept or reject any and all offers, or withdraw any land or interest in land for sale if, in the opinion of the Regional Director, consummation of the sale would not be fully consistent with the Act of February 2, 1911 (36 Stat. 895, 43 U.S.C. 374), or other applicable laws. Should the land remain unsold, it may be reoffered for sale at a later date as determined by the Regional Director. In order to promote full and free competition, the bid forms required for this sale contain a statement that the purchase price has been determined independently by the bidder; this statement must accompany each sealed bid.

The sale of the land is consistent with the Bureau of Reclamation land use planning, and it was determined that the public interest would best be served by offering this land for sale.

Resource clearances consistent with the National Environmental Policy Act

requirements have been completed and approved. A Categorical Exclusion Checklist is available for public review at the Shasta office.

The quitclaim deeds issued for the land sold will be subject to easements or rights-of-way existing or of record in favor of the public or third parties.

For a period of 60 days from the date of this notice, interested parties may submit comments to the Regional Director, Mid-Pacific Region, Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825. Any adverse comments will be evaluated by the Regional Director who may vacate or modify this Realty Action and issue a final determination. In the absence of any action by the Regional Director, this Realty Action will become the final determination of the Department of the Interior.

Dated: April 9, 1990.

Neil W. Schild,

Acting Regional Director, Mid-Pacific Region, Bureau of Reclamation.

[FR Doc. 90-9211 Filed 4-19-90; 8:45 am]

BILLING CODE 4310-09-M

Office of Surface Mining Reclamation and Enforcement

Request for Determination of Valid Existing Rights Within William B. Bankhead National Forest

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of request for determination and invitation for interested persons to participate.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) has received a request for a determination that C. D. Covington and wife, Lois Covington, (the requestors) have valid existing rights (VER) to surface mine coal on certain properties within the William B. Bankhead National Forest in Winston County, Alabama. By this notice, OSM is inviting interested persons to participate in the proceeding and to submit relevant factual material on the matter. OSM intends to develop a complete Administrative Record and will render a final agency decision on whether the requestors have VER.

DATES: OSM will accept written materials on this request for a VER determination until 5 p.m. local time on June 4, 1990.

ADDRESSES: Hand deliver or mail written materials to Carl C. Close, Assistant Director, Eastern Field Operations at the address listed below. Documents contained in the Administrative Record are available for public review at the locations listed below during normal business hours, Monday through Friday, excluding holidays.

Office of Surface Mining Reclamation and Enforcement, Eastern Field Operations, room 246, Ten Parkway Center, Pittsburgh, PA 15220, Telephone: (412) 937-2897

Office of Surface Mining Reclamation and Enforcement, Birmingham Field Office, 280 W. Valley Avenue, Homewood, Alabama, 35209, Telephone: (205) 731-0890

SUPPLEMENTARY INFORMATION: Section 522(e) of the Surface Mining Control and Reclamation Act (SMCRA) prohibits surface coal mining operations in certain areas, subject to VER and except for those operations which existed on August 3, 1977. Under § 522(e)(2), the prohibition is applied to any Federal lands within the boundaries of any national forest unless the Secretary of the Interior finds that there are no significant recreational, timber, economic or other values that may be incompatible with such surface coal mining operations and the surface operation and impacts are incident to an underground coal mine. National forest land west of the 100th meridian that does not have significant forest cover as determined by the Secretary of Agriculture may be surface coal mined.

The term "VER" is not defined in SMCRA. On September 14, 1983 (48 FR 41312), OSM adopted a regulatory definition of VER at 30 CFR 761.5 which defined VER as those rights, which if affected by the prohibitions in section 522(e), would entitle the owner to payment of just compensation under the Fifth and Fourteenth Amendments to the United States Constitution, the so-called "takings" test.

On March 22, 1985, the United States District Court for the District of Columbia held that the promulgation of the VER definition in 30 CFR 761.5 violated the Administrative Procedures Act and remanded the definition to the Secretary of the Interior (*IN RE: Permanent Surface Mining Regulation Litigation II* No. 79-1144).

In the November 20, 1986, **Federal Register** (51 FR 41952), OSM suspended the Federal definition of VER insofar as it incorporates a takings test. OSM announced that during the period of suspension it would make VER determinations on Federal lands within the boundaries of national forests using the VER definition contained in the appropriate state regulatory program.

The term VER is defined in section 880-X-2A-.06(zzzzzz) of the rules of the Alabama Surface Mining Commission. This section states that VER means those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce coal by a surface coal mining operation; and the persons proposing to conduct surface coal mining operations on such lands either had made a good faith attempt, on or before August 3, 1977, to obtain all State and Federal permits necessary to conduct such operations on those lands or can demonstrate that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which a good faith attempt had been made to obtain all permits prior to August 3, 1977. This is known as the good faith all permits test for VER.

By letter dated March 30, 1990, C. D. Covington requested that OSM make a determination of VER for properties in the Bankhead Ranger District of the William B. Bankhead National Forest. Mr. Convington alleges that he and his wife, Lois Covington, own the minerals on these properties, the surface of which is owned by the United States of America and managed by the United States Forest Service. The properties in question are described as follows:

160 acres more or less at the S½ of NW¼; NE¼ of SW¼; NW¼ of SE¼ of Section 29, Township 11 south, Range 7 west and 80 acres more or less located at the N½ of NW¼ of Section 30, Township 11 south, Range 7 west. The properties are a portion of Forest Service tract B-2049c. Mr. Covington is seeking VER to mine the Black Creek coal seam.

In order to establish that the requestors have VER for surface coal mining on the properties in question, OSM must first determine that they have demonstrated all necessary rights to mine the coal. OSM invites interested persons to provide factual information as to whether the requestors have the property right to mine by the proposed method, and other information concerning whether the requestors have VER under the applicable standards.

OSM will make a final decision on this VER request as soon as it is practicable following completion of the Administrative Record.

If OSM determines that the requestors have VER, they may apply to the Alabama Surface Mining Commission for permit(s), which if issued, will authorize the mining of coal by surface methods on the properties in question. If it is determined that the requestors do not have VER, no permit(s) will be

issued for coal mining by surface methods. In the absence of VER, permits may be issued for underground mining, if such operations are found to be compatible with recreational, timber, economic and other values of the William B. Bankhead National Forest.

Dated: April 12, 1990.

Carl C. Close,

Assistant Director, Eastern Field Operations.

[FR Doc. 90-9201 Filed 4-19-90; 8:45 am]

BILLING CODE 4310-05-M

INTERSTATE COMMERCE COMMISSION

AGRICULTURAL COOPERATIVE; NOTICE TO THE COMMISSION OF INTENT TO PERFORM INTERSTATE TRANSPORTATION FOR CERTAIN NONMEMBERS

Date: April 17, 1990.

The following Notices were filed in accordance with section 10526(a)(5) of the Interstate Commerce Act. These rules provide that agricultural cooperatives intending to perform nonmember, non-exempt, interstate transportation must file the Notice, Form BOP 102, with the Commission within 30 days of its annual meetings each year. Any subsequent change concerning officers, directors, and location of transportation records shall require the filing of a supplemental Notice within 30 days of such change.

The name and address of the agricultural cooperative (1) and (2), the location of the records (3), and the name and address of the person to whom inquiries and correspondence should be addressed (4), are published here for interested persons. Submission of information which could have bearing upon the propriety of a filing should be directed to the Commission's Office of Compliance and Consumer Assistance, Washington, DC 20423. The Notices are in a central file, and can be examined at the Office of the Secretary, Interstate Commerce Commission, Washington, DC.

(1) and (2) Land O'Lakes, Inc., 4001 Lexington Avenue North, Arden Hills, MN 55126

(3) 4001 Lexington Avenue North, Arden Hills, MN 55126

(4) Herb Sorvik, P.O. Box 116, Minneapolis, MN 55440

Noreta R. McGee,

Secretary.

[FR Doc. 90-9205 Filed 4-19-90; 8:45 am]

BILLING CODE 7035-01-M

Intent To Engage in Compensated Intercorporate Hauling Operations

This is to provide notice as requied by 49 U.S.C. 10524(b)(1) that the named corporations intend to provide or use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

The parent corporation is Shoney's Inc. Its address is 1727 Elm Hill Pike Nashville, TN 37210. It is a Tennessee corporation which does business using the following assumed names: (a) Captain D's; (b) Lee's Famous Recipe Chicken; (c) Pargos; (d) Fifth Quarter Steak House; and (e) Shoney's Inn. All of the foregoing are divisions of Shoney's Inc.

Wholly-owned subsidiaries which will participate in the operations are:

(1) Commisary Operations, Inc., a Tennessee corporation, the address of which is 1727 Elm Hill Pike, Nashville, TN. 37210.

(2) Mike Rose Foods, Inc., a Tennessee Corporation, the address of which is 189 Spence Lane, Nashville, TN. 37210.

Noreta R. McGee,

Secretary.

[FR Doc. 90-9206 Filed 4-19-90; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 31652]

South Carolina Central Railroad Co., Inc.—Trackage Rights Exemption—CSX Transportation, Inc.; Exemption

CSX Transportation, Inc. (CSXT), has agreed to grant trackage rights to South Carolina Central Railroad Company, Inc. (SCCR), over approximately 2.5 miles of CSXT track located between CSXT Valuation Station Nos. 5574+52 and 5700+00, at Florence, SC. The trackage rights will permit SCCR to serve Vulcraft Steel Company's facility at Florence. The trackage rights will be effective upon consummation of the trackage rights agreement between CSXT and SCCR or the effective date of this notice, whichever is later.

This notice is filed under 49 CFR 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: Frank J. Pergolizzi, Slover & Loftus, 1224 Seventeenth Street NW., Washington, DC 20036.

As a condition to the use of this exemption, any employees affected by the trackage rights will be protected pursuant to *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Dated: April 16, 1990.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta. R. McGee,

Secretary.

[FR Doc. 90-9207 Filed 4-19-90; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 88-19]

Arunkumar J. Shah, M.D., Revocation of Registration

This proceeding before the Drug Enforcement Administration (DEA) was initiated by an Order to Show Cause issued February 11, 1988, proposing to revoke DEA Certificate of Registration AS9062162, previously issued to Arunkumar J. Shah, M.D. (Respondent). The Order to Show Cause alleged that Respondent's continued registration would be inconsistent with the public interest, as set forth in 21 U.S.C. 823(f) and 21 U.S.C. 824(a).

Respondent, by counsel, timely requested a hearing and, following prehearing procedures, the hearing was held in Houston, Texas on January 24 and 25, 1989 and in Washington, DC on March 22, 1989. Administrative Law Judge Francis L. Young presided. After the hearing, both parties filed proposed findings of fact and conclusions of law. The administrative law judge issued his recommended decision on October 31, 1989. On December 14, 1989, Judge Young transmitted the record of these proceedings to the Administrator for final agency action.

The Acting Administrator has considered the record in its entirety and, pursuant to 21 CFR 1316.67, hereby issues his final order in this matter, based upon findings of fact and conclusions of law as hereinafter set forth.

On November 21, 1986, an undercover Investigator with the Texas State Board of Medical Examiners (Greenfield) visited Respondent's office. He told Respondent that he worked long hours and wanted something to make him "feel good" at the end of the day. Greenfield asked for a prescription for Percodan. Respondent performed a thorough physical exam, arranged for a blood analysis and took a medical history. Respondent declined to issue a prescription for Percodan, but did

prescribe the sedative Xanax, a Schedule IV controlled substance. No legitimate medical reason was given for either Percodan or Xanax.

Greenfield visited Respondent's office again on December 9, 1986. Greenfield told Respondent that he was working around machinery, so would not be taking any medication during the day. He explained that he wanted something to take in the evening for a good feeling and to relax a little bit. He told Respondent that the Xanax had no effect and asked for something stronger. Respondent knew that Greenfield had no trouble sleeping. Respondent wrote two prescriptions for Greenfield, one for Tranxene, 7.5 mg. and one for the 3.75 mg. strength. Tranxene is a Schedule IV controlled substance. Greenfield also asked for Tuinal but Respondent refused. Greenfield gave no legitimate medical reason for either Tranxene or Tuinal.

On December 17, 1986, Greenfield returned to see Respondent and again requested Tuinal. After Greenfield's weight and blood pressure were checked, Respondent issued a prescription for Tuinal. Tuinal is a Schedule II sedative used to treat insomnia. Greenfield gave no legitimate medical reason for the Tuinal prescription. On this occasion, a DEA Special Agent (Sanchez) accompanied Greenfield and was introduced to Respondent as Greenfield's employee. Greenfield requested that Respondent check Sanchez because he was "so wired up every day" and "he's a nervous wreck." Respondent gave Sanchez a physical examination and took a medical history. Respondent wrote Sanchez a prescription for Tranxene.

Greenfield's final visit to Respondent's office was on January 14, 1987. No physical examination was performed and no medically significant information was elicited. Greenfield told Respondent that the Tuinal was good and requested another prescription but this time enough to last two months. Respondent refused the two month request stating that he had to "cover" himself. Greenfield gave Respondent $200 for a prescription for Tuinal and Elavil and as advance payment for one or more future prescriptions which Sanchez was to pick up at a later date for Greenfield. Greenfield did not talk to Respondent again, in person or by telephone.

On February 20, 1987, Sanchez visited Respondent alone. He told Respondent that he had talked with Greenfield by telephone and that Greenfield wanted prescriptions for Tuinal and Tranxene. Without any discussion as to Greenfield's health, Respondent gave Sanchez the requested prescription. On both March 10, 1987 and April 9, 1987, Sanchez obtained prescriptions written by Respondent for Greenfield for Xanax and Tuinal. Again, there was no discussion of Greenfield's health and Greenfield has no contact with Respondent. No legitimate medical reason was given for any of these prescriptions.

Sanchez also obtained prescriptions from Respondent for himself. On December 17, 1986, Respondent wrote a prescription for Sanchez for 30 dosage units of Tranxene. On January 14, 1987, Respondent wrote Sanchez a prescription for Elavil saying it was "to perk you up for today and give you a good sleep." On February 20, 1987, Respondent gave Sanchez a prescription for 30 dosage units of Tranxene. On March 10, 1987, Respondent gave Sanchez a prescription for 60 dosage units of Xanax. No legitimate medical reason was presented for any of these prescriptions.

Sanchez's final undercover visit to Respondent was on April 9, 1987. On this occasion he was accompanied by DEA Special Agent Pam McCullough who posed as Sanchez's fiancee. No medical examination was performed on either Agent and no medical questions were asked. Respondent gave Sanchez a prescription for Xanax, 60 dosage units. Sanchez and McCullough told Respondent that they were going to be married in the very near future. Neither one gave any indication of being anxious, nervous or tense. On the contrary, they laughed and joked with Respondent.

Sanchez asked Respondent to write a Xanax prescription for McCullough, saying "so I don't have to share mine with her." Respondent complied. He cautioned Sanchez not to take the prescriptions to the same pharmacy because a pharmacist might begin asking questions.

Based on the aforementioned facts, Respondent was indicted on August 7, 1987, in the United States District Court for the Southern District of Texas on 12 counts of violating 21 U.S.C. 841(a). Approximately five months after the administrative hearing conducted by Judge Young, Respondent was placed in the pre-trial diversion program which deferred prosecution of his Federal indictment for 12 months. This deferral of prosecution, which began August 11, 1989, was predicated on, among other things, a one year surrender of Respondent's state medical license and DEA Certificate of Registration to handle controlled substances. Contingent on satisfactory completion of the pretrial diversion program in August 1990, the agreement provides that the indictment will be dismissed and Respondent will regain his state medical license and DEA Certificate of Registration. The DEA is not a party to this agreement and did not participate in any discussion of its terms.

21 U.S.C. 824(a)(4) and 823(f) set forth the factors to be considered in determining whether Respondent's registration is in the public interest. They are: 1. The recommendation of the appropriate State licensing board or professional disciplinary authority. 2. The applicant's experience in dispensing, or conducting research with respect to controlled substances. 3. The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances. 4. Compliance with applicable State, Federal, or local laws relating to controlled substances. 5. Such other conduct which may threaten the public health and safety. The Acting Administrator may rely on any one, or any combination of, those enumerated factors. He may give such factors the weight he deems appropriate in determining whether a registration should be revoked or an application denied. See, for example, Henry J. Schwarz, Jr., M.D., Docket No. 88–42, 54 FR 16422 (1989).

To demonstrate that the prescriptions were for a legitimate medical purpose, Respondent points to his medical records for Greenfield which show a diagnosis of anxiety or anxiety with depression. The administrative law judge found however, that in light of all the other evidence, those entries of diagnosis were spurious. They were made by Respondent either contemporaneously or after the fact to give an appearance of propriety to prescriptions he knew were for no legitimate medical purpose. For Agent McCullough, there was no medical record at all.

From transcripts of the recorded conversations between Respondent, Greenfield and Sanchez, it is clear that Respondent was issuing prescriptions on request and without any discussion of the patient's health. Respondent's concern was more that he not get caught than prescribing controlled substances that were medically indicated. The administrative law judge found, and the Acting Administrator concurs, that the record clearly establishes that Respondent wrote a number of prescriptions for controlled substances for three undercover officers on seven occasions over a six-month period for no legitimate medical purpose.

Respondent's conduct on these occasions violated State and Federal laws. The Acting Administrator finds ample evidence in the record to support a finding that Respondent's acts were criminal. There can be no doubt, after reviewing the transcripts, that Respondent knew he was issuing prescriptions without legitimate medical purpose.

Finally, the administrative law judge concluded, and the Acting Administrator concurs, that Respondent's spurious entries of diagnosis in the medical records of Mr. Greenfield and his false testimony at the hearing constituted "other conduct which may threaten the public health and safety." 21 U.S.C. 823(f)(5).

Based on the evidence adduced at the hearing as previously discussed, and based on the sanctions imposed by Respondent's pre-trial diversion, the Acting Administrator concludes that Respondent's continued registration is not in the public interest.

Accordingly, having concluded that there is a lawful basis for the revocation of Respondent's registration and having further concluded that under the facts and circumstances presented in the case, the registration should be revoked, the Acting Administrator, pursuant to the power vested in him by 21 U.S.C. 824 and 28 CFR 0.100(b), hereby orders that DEA Certificate of Registration AS9062162, previously issued to Arunkumar J. Shah, M.D., be, and it hereby is, revoked. Any pending applications for renewal of such registration are hereby denied.

This order shall be effective May 21, 1990.

Dated: April 13,1990.

Terrence M. Burke,

Acting Administrator.

[FR Doc. 90–9135 Filed 4–19–90; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Office of the Secretary

Agency Recordkeeping/Reporting Requirements Under Review by the Office of Management and Budget (OMB)

Background: The Department of Labor, in carrying out its responsibilities under the Paperwork Reduction Act (44 U.S.C. chapter 35), considers comments on the reporting and recordkeeping requirements that will affect the public.

List of Recordkeeping/Reporting Requirements Under Review: As necessary, the Department of Labor will publish a list of the Agency recordkeeping/reporting requirements under review by the Office of Management and Budget (OMB) since the last list was published. The list will have all entries grouped into new collections, revisions, extensions, or reinstatements. The Departmental Clearance Officer will, upon request, be able to advise members of the public of the nature of the particular submission they are interested in.

Each entry may contain the following information:

The agency of the Department issuing this recordkeeping/reporting requirement.

The title of the recordkeeping/reporting requirement.

The OMB and Agency identification numbers, if applicable.

How often the recordkeeping/reporting requirement is needed.

Who will be required to or asked to report or keep records.

Whether small businesses or organizations are affected.

An estimate of the total number of hours needed to comply with the recordkeeping/reporting requirements and the average hours per respondent.

The number of forms in the request for approval, if applicable.

An abstract describing the need for and uses of the information collection.

Comments and Questions: Copies of the recordkeeping/reporting requirements may be obtained by calling the Departmental Clearance Officer, Paul E. Larson, telephone (202) 523–6331. Comments and questions about the items on this list should be directed to Mr. Larson, Office of Information Management, U.S. Department of Labor, 200 Constitution Avenue NW., room N–1301, Washington, DC 20210. Comments should also be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for (BLS/DM/ESA/ETA/OLMS/MSHA/OSHA/PWBA/VETS), Office of Management and Budget, room 3208, Washington, DC 20503 (Telephone (202) 395–6880).

Any member of the public who wants to comment on a recordkeeping/reporting requirement which has been submitted to OMB should advise Mr. Larson of this intent at the earliest possible date.

Revision

Employment and Training Administration.

Weekly Claims and Extended Benefits Data.

1205–0028; ETA 539.

Weekly.

State or local governments.

53 respondents; 3,445 total hours; 1 hr 15 min. per response; 1 form

Data for the determination of the beginning, continuance, or termination of an extended benefit period in any State by reason of the EB trigger rate. Also data on initial and continued claims used as economic indicators.

Extension

Employment and Training Administration.

Job Corps Enrollee Allotment Determination.

1205–0030; ETA 658.

On occasion.

Individuals or households; Federal agencies or employees.

16,560 respondents; 3,312 hours; 12 minutes per form; 1 form.

Job Corps enrollees may elect to have a portion of their Readjustment Allowance sent to a dependent monthly. This form provides the information necessary to administer those allotments.

Overpayment Detection/Recovery Activities.

1205–0173; ETA 227.

Quarterly.

State or local governments.

53 respondents; 13,992 hours; 66 hours per respondent; 1 form.

The Secretary has interpreted applicable sections of Federal laws, to require States to have reasonable provisions in their State UI laws that concern the prevention, detection and recovery of benefit overpayments caused by willful misrepresentation or errors by claimants or others. This report provides an accounting of the types and amounts of such overpayments and serves a useful management tool for monitoring overall UI program integrity.

Employment Standards Administration.

Notice of Recurrence of Disability and Claim for Continuation of Pay/Compensation.

1215–0167; CA–2a.

On occasion.

Individual or households; Federal agencies or employees.

2,400 respondents; 1,200 total hours; 30 min. per response; 1 form.

This form is used by current or former Federal employees to claim wage loss or medical treatment resulting from a work related injury while Federally employed. The information is necessary to ensure the accurate payment of benefits.

Signed at Washington, DC this 17th day of April, 1990.

Paul E. Larson,

Departmental Clearance Officer.

[FR Doc. 90-9241 Filed 4-19-90; 8:45 am]

BILLING CODE 4510-27-M

Employment and Training Administration

[TA-W-22,071]

Southern Triangle Oil Co.; Revised Final Determination on Remand

In the matter of Southern Triangle Oil Co., Mt. Carmel, IL, Operating at Various Locations in the Following States: TA-W-22,071A, Illinois; TA-W-22,071B, Indiana; TA-W-22,071C, Ohio; TA-W-22,071D, West Virginia.

By order dated February 14, 1990, the United States Court of International Trade remanded this case to the Department of Labor to "correct its Certification in this case to make it clear to the State administering authorities that the retroactive provisions of the 1988 Trade Act [section 1421(a)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988] apply to the certification of eligibility to apply for worker adjustment assistance of the former employees of Southern Triangle, including Mr. Charles Pierson." *Former Employees of Southern Triangle Oil Co.* v. *United States Secretary of Labor*, No. 89-03-00158, slip op. 90-16 at 14 (Ct. Int'l Trade Feb. 14, 1990).

The Secretary believes that the Court of International Trade erred in finding that section 1421(a)(1)(B) applies to the former workers of Southern Triangle. Nevertheless, the Secretary now complies with the court's order under protest while preserving her right of appeal. Accordingly, the Secretary, through a duly authorized representative, certifies as follows:

Pursuant to the Court of International Trade's remand order of February 14, 1990, Mr. Charles Pierson and all other workers of Southern Triangle Oil Company, Mt. Carmel, Illinois (which operates at various locations in the states listed below) who were totally or partially separated from employment on or after October 1, 1985 and before November 15, 1987, are eligible to apply for adjustment assistance under section 1421(a)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988.

TA-W-22,071A, Illinois
TA-W-22,071B, Indiana
TA-W-22,071C, Ohio
TA-W-22,071D, West Virginia

Because the Court of International Trade "considers its February 14 [, 1990] order an interlocutory order, not a final dispositive judgment * * *", *Former Employees of Southern Triangle Oil Co.* v. *United States Secretary of Labor*, No. 89-03-00158, mem. order at 2 (Ct. Int'l Trade Mar. 19, 1990) (denying motion to stay), *aff'd sub nom. Pierson* v. *United States*, No. 90-1262) Fed. Cir. Apr. 4, 1990) (order dismissing appeal), this revised final determination will not take effect until the court has entered its final dispositive judgment in this case. The Secretary reserves her right to recover any funds disbursed pursuant to this certification should the court's final judgment be reversed on appeal.

Signed at Washington, DC this 13th day of April, 1990.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 90-9218 Filed 4-19-90; 8:45 am]

BILLING CODE 4510-30-M

[Employment Service Program Letter No. 8-90]

Targeted Jobs Tax Credit Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Targeted Jobs Tax Credit (TJTC) program, was extended through September 30, 1990, under the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101-239, December 19, 1989). See Internal Revenue Code of 1986, section 51.

Employment Service Program Letter No. 8-90, dated April 13, 1990, to State employment security agencies (SESAs), reprinted below, issued answers to questions raised or anticipated regarding the TJTC program. They are intended to assist SESAs, other participating agencies, and employers to implement an effective program and to minimize disruption.

EFFECTIVE DATE: The TJTC program extension was signed on December 19, 1989. The modified certification request requirements apply to individuals who begin work for the employer after December 31, 1989. Employment Service Program Letter No. 8-90 was issued on April 13, 1990.

FOR FURTHER INFORMATION CONTACT: Mr. Edward M. Hogan, Chief, Employment Service Operations, United States Employment Service, Employment and Training Administration, Department of Labor, Room N4470, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 535-0190. (This is not a toll-free number). For general TJTC program information contact individual SESAs, listed in most local telephone directories under the State Government headings.

Signed at Washington, DC, this 16th day of April, 1990.

Roberts T. Jones,

Assistant Secretary for Employment and Training.

BILLING CODE 4510-30-M

U.S. Department of Labor Employment and Training Administration Washington, D.C. 20210	CLASSIFICATION ES/TJTC
	CORRESPONDENCE SYMBOL TEESS
	DATE April 13, 1990

EMPLOYMENT SERVICE PROGRAM LETTER NO. 8-90

DIRECTIVE :

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : DONALD J. KULICK
Administrator
Office of Regional Management

SUBJECT : Extension of the Targeted Jobs Tax Credit Program - Questions and Answers

1. Purpose. To transmit questions and answers on the Targeted Jobs Tax Credit (TJTC) program which relate to the extension and modification of the program.

2. References. ESPL 4-90, December 29, 1989; ET Handbook #377, 4th Edition, July 1988.

3. Information. The TJTC program was extended through September 30, 1990 by Section 7103 of the Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239, December 19, 1989). The attached list of Questions and Answers (Qs&As) addresses those raised pertaining to the new provisions, which apply to employer requests for certification, and others that may be helpful to SESAs in the effective operation of the program.

4. Action. State Administrators are encouraged to make the attached list of Qs&As available wherever it may contribute to a better understanding and more efficient operation of the TJTC program, which may include staff, employers and applicants.

5. Inquiries. Questions pertaining to the attachment may be directed to your Employment and Training Administration Regional Office.

6. Attachment. TJTC Program Questions and Answers

RESCISSIONS	EXPIRATION DATE September 30, 1990

DISTRIBUTION

TARGETED JOBS TAX CREDIT (TJTC) PROGRAM

Questions and Answers ----------

1. Q.: What is the present status of the TJTC program?

   A.: Under Section 7103 of the Omnibus Budget Reconciliation Act (Revenue Reconciliation Act) of 1989 (P.L. 101-239, December 19, 1989), the TJTC program is extended through September 30, 1990.

2. Q.: Was the TJTC program otherwise changed by P.L. 101-239?

   A.: Yes. Provisions were added requiring that employers requesting certification specify (1) potential basis for eligibility of the individual as a member of a targeted group (but not more than two), and (2) certify that a good faith effort was made to determine the individual's eligibility.

3. Q.: How may an employer make a good faith effort to determine that an individual is a member of one or another targeted group?

   A.: Various ways may be acceptable. Two examples are offered. Any method used must insure the applicant's civil rights are not violated.

   (1) In cooperation with the State Employment Security Agency (SESA), general descriptions of targeted group eligibility requirements (qualifications) may be developed and used in pre-employment screening by requesting the applicant's assistance in determining his/her possible eligibility, e.g., this could include the applicant identifying which group from a list on an application form. This may be used in conjunction with other employer personnel practices.

(2) Positive recruitment activities through programs or agencies which generally serve members of targeted groups, for example, State or Veterans rehabilitation programs, blind or disabled persons services, youth services programs, cultural and ethnic service organizations, welfare agencies, or cooperative education facilities.

4. Q.: What was the primary reason for inclusion of the new provisions in the law?

A.: It is the intent of Congress that employers consciously recruit and hire eligibles from among the nine TJTC targeted groups. The new provisions require the employer to tentatively identify eligibles during recruiting.

5. Q.: What action should a SESA take if the employer specifies more than two targeted groups in his request for a certification?

A.: The SESA may either reject the request for certification, provide additional orientation to the employer, or permit the employer to modify the specification without affecting the filing date, using discretion and considering circumstances.

6. Q.: What action can be expected if an individual is a member of a targeted group other than one of the two which the employer designates?

A.: The SESA should process the request for certification of the individual under the correct targeted group if eligible.

7. Q.: Prior to enactment of the new legislation, the employer's signature on the request for certification was not mandatory. Is a signature now required? Why?

A.: Yes. The law requires "certification" of a good faith effort on the part of the employer. Certification requires a signature. It may be a part of a form, letter of request, or other document acceptable to the State agency. A State agency may choose to accept a variety of forms of signature, so long as they are legally valid within the State. In many instances machine affixed signatures, or a prior filed document with a signor who accepts liability for each "good faith" certification statement submitted by that organization, can be legally valid.

8. Q: How can employers comply with the new provisions and still be in compliance with civil rights laws during the pre-employment interview?

A.: The "good faith effort" clause allows employers to adhere to civil rights and privacy laws while making a tentative designation of targeted group membership.

9. Q.: May an employer appeal to a SESA the denial of request for certification which was incorrectly submitted, on the grounds that the SESA did not provide enough procedural information to the employer?

A.: No. It is the responsibility of the employer to know and comply with the law and the necessary procedures. The employer should seek guidance and information about the TJTC program and procedures from the SESA so that the employer can comply. The U.S. Departments of Labor and Treasury provide public information about the TJTC law and program, and SESAs are responsible for determining and publicizing procedural requirements.

10. Q.: What codes are employers to use to designate the potential targeted groups of individuals being hired?

A.: The new law involves the employer, for the first time, in designating potential targeted group eligibility. To assure accuracy in the cross utilization of information by SESAs, employers, IRS, and ETA, employers are being notified to utilize the targeted group sequence and codes (A through J) designated in Section 51 (d) (1), Internal Revenue Code, as follows:

(A) A Vocational Rehabilitation Referral,

(B) An Economically Disadvantaged Youth,

(C) An Economically Disadvantaged Vietnam-era Veteran,

(D) A Supplemental Security Income (SSI) Recipient,

(E) A General Assistance Recipient,

(F) A Youth Participating in a Cooperative Education Program,

(G) An Economically Disadvantaged Ex-Convict,

(H) An Eligible Work Incentive Employee (Includes WIN Demonstration Participants and AFDC Recipients),

(I) (No designation; inapplicable at this time)

(J) A Qualified Summer Youth (Economically Disadvantaged).

11. Q.: Why should employers use the targeted group codes instead of the title or words?

A.: Under the current amendment it is the first that the employer has usually been involved or aware of the specific targeted group membership of the applicant. Use of the code by the employer helps to preserve the privacy of the applicant to the extent possible, even in the processing of the action within the employing company.

12. Q.: Must consulting or assistance companies serving as employer representatives adopt the targeted group codes as designated in Section 51(d)(1), Internal Revenue Code?

A.: Unless they are involved in the personal or work relationship with the applicant, as a co-worker or staff member of the employing company might be, the consulting or assisting company representing the employer for TJTC processing does not breach the privacy issue. Therefore, the consulting or assisting companies need not use only the codes for targeted group identification.

13. Q.: Must SESAs immediately convert their existing targeted group sequence or codes to those used in the Internal Revenue Code, Section 51(d)(1)?

A.: No. So long as the SESA staff processing TJTC will accurately convert the employer designations of potential targeted group eligibility to those codes or sequences already in use by the SESA, such as on existing supplies of forms, records, or computerized systems, they need not immediately convert, but should plan a cost effective changeover. No TJTC records for employment start dates before January 1, 1990, should be changed to adjust to the codes or sequence used in Section 51(d)(1), Internal Revenue Code.

14. Q.: Is the TJTC program funded through the extended authorized period, to September 30, 1990?

A.: Yes. Public Law 101-166 was signed by President Bush on November 21, 1989, appropriating funds for State Employment Security Agencies (SESAs) to operate the TJTC program between October 1, 1989, and September 30, 1990.

15. Q.: What elements are required in an employer's request for certification?

A.: Employer name, IRS number; the name, social security number, employment starting date, and the potential targeted group membership of the workers for whom certification is requested, and the certification of good faith effort to so determine that membership.

16. Q.: How does an employer request for certification differ from a "letter of intent"?

A.: The letter of intent is not a part of the required TJTC program.

17. Q.: What is the major difference between the use of the "hiring date" and the "date employee begins work"?

A.: The hiring date is when an agreement is reached between the employer and the jobseeker. The tax credit qualification begins on the date the employee starts to provide a product or service for the employer and earn wages or salary paid by the employer.

18. Q.: Are Lower Living Standard Income Levels (LLSIL) applicable under the new legislation?

A.: The current Lower Living Standard Income Level (LLSIL) is applicable, presently published as a Federal Register Notice, dated April 4, 1989, 54 FR 13575, usually updated annually.

19. Q.: What references govern and guide the TJTC program?

A.: Internal Revenue Code (IRC) A1, Part IV F, Sections 51 and 52, as amended; Internal Revenue Service regulation 26 CFR 1, 5, 5h and 602, dated November 6, 1985; IRS Publication 572; Lower Living Standard Income Level, as published as a Federal Register Notice, April 4, 1989; Employment and Training Administration Handbook Number 377, dated July 1988.

[FR Doc. 90-9242 Filed 4-19-90; 8:45 am]
BILLING CODE 4510-30-C

Federal-State Unemployment Compensation Program; Extended Benefits; New Extended Benefit Period in the State of Rhode Island

This notice announces the beginning of a new Extended Benefit Period in Rhode Island, effective on April 1, 1990, and remaining in effect for at least 13 weeks after that date.

Background

The Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note) established the Extended Benefit Program as a part of the Federal-State Unemployment Compensation Program. Under the Extended Benefit Program, individuals who have exhausted their rights to regular unemployment benefits (UI) under permanent State (and Federal) unemployment compensation laws may be eligible, during an extended benefit period, to receive up to 13 weeks of extended unemployment benefits, at the same weekly rate of benefits as previously received under the State law. The Federal-State Extended Unemployment Compensation Act is implemented by State unemployment compensation laws and by part 615 of title 20 of the Code of Federal Regulations (20 CFR part 615).

Each State unemployment compensation law provides that there is State "on" indicator (triggering on an Extended Benefit Period) for a week if the head of the State employment security agency determines that, for the period consisting of that week and the immediately preceding 12 weeks, the rate of insured unemployment in the State equaled or exceeded the State trigger rate. The Extended Benefit Period actually begins with the third week following the week for which there is an "on" indicator in the State. A benefit period will be in effect for a minimum of 13 weeks, and will end the third week after there is an "off" indicator.

Determination of an "on" Indicator

The head of the employment security agency of the State named above has determined that the rate of insured unemployment in the State, for the 13-week period ending on March 17, 1990, equals or exceeds 5 percent and is 20 percent higher than the corresponding 13 week period in the prior two years, so that for that week there was an "on" indicator in the State.

Therefore, a new Extended Benefit Period commenced in the State with the week beginning on april 1, 1990. This period will continue for no less than 13 weeks, and until three weeks after a week in which there is an "off" indicator in the State.

Information for Claimants

The duration of extended benefits payable in the Extended Benefit Period, and the terms and conditions on which they are payable, are governed by the Act and the State unemployment compensation law. The State employment security agency will furnish a written notice of potential entitlement to extended benefits to each individual who has established a benefit year in the State that will expire after the new Extended Benefit Period begins. 20 CFR 615.13(d)(1). The State employment security agency also will provide such notice promptly to each individual who exhausts all rights under the State unemployment compensation law to regular benefits during the Extended Benefit Period. 20 CFR 615.13(d)(2).

Persons who believe they may be entitled to extended benefits in the State named above, or who wish to inquire about their rights under the Extended Benefit Program, should contact the nearest State employment service office or unemployment compensation claims office in their locality.

Signed at Washington, DC, on April 11, 1990.

Roberts T. Jones,

Assistant Secretary of Labor.

[FR Doc. 90-9217 Filed 4-19-90; 8:45 am]

BILLING CODE 4510-30-M

Employment Standards Administration, Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register** or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration,

Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., room S–3014, Washington, DC 20210.

Modifications to General Wage Determination Decisions

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

New Jersey, NJ90–6 (Jan. 5, 1990).	p. 723, p. 724.
New York, NY90–12 (Jan. 5, 1990).	p. 851, p. 858.
Tennessee, TN90–2 (Jan. 5, 1990).	p. 1163, p. 1164.

Volume II

Iowa:	
IA90–2 (Jan. 5, 1990)	p. 23, p. 24.
IA90–3 (Jan. 5, 1990)	p. 29, p. 30.
IA90–4 (Jan. 5, 1990)	p. 33, p. 34.
IA90–5 (Jan. 5, 1990)	p. 37, pp. 38–40.
Indiana, IN90–3 (Jan. 5, 1990).	p. 267, pp. 268–269.
Kansas:	
KS90–3 (Jan. 5, 1990)	p. 345.
KS90–4 (Jan. 5, 1990)	p. 347.
KS90–5 (Jan. 5, 1990)	p. 349.
Michigan:	
MI90–1 (Jan. 5, 1990)	p. 421, pp. 422–425, 427.
MI90–2 (Jan. 5, 1990)	p. 441, pp. 442–444.
MI90–3 (Jan. 5, 1990)	p. 457, pp. 458–459.
MI90–4 (Jan. 5, 1990)	p. 471, p. 472.
MI90–5 (Jan. 5, 1990)	p. 479, pp. 480–481.
MI90–7 (Jan. 5, 1990)	p. 495, p. 496.
MI90–12 (Jan. 5, 1990)	p. 525, pp. 526–527.
MI90–17 (Jan. 5, 1990)	p. 541, p. 542.
Ohio:	
OH90–1 (Jan. 5, 1990)	p. 777, pp. 778–782, pp. 788–789.
OH90–2 (Jan. 5, 1990)	p. 791, pp. 792–793, pp. 797–799, pp. 805–807.
OH90–29 (Jan. 5, 1990).	p. 873, pp. 875–876, pp. 883, 885–887, pp. 898–899.

Volume III

Arizona, AZ90–1 (Jan. 5, 1990).	p. 9, p. 10.
Colorado, CO90–4 (Jan. 5, 1990).	p. 125, pp. 126–128.
Montana, MT90–3 (Jan. 5, 1990).	p. 211, p. 212.
Nevada, NV90–5 (Jan. 5, 1990).	p. 289, pp. 291–292.

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon and Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783–3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 13th day of April 1990.

Alan L. Moss,

Director, Division of Wage Determinations.

[FR Doc. 90–8965 Filed 4–19–90; 8:45 am]

BILLING CODE 4510–27–M

Mine Safety and Health Administration

[Docket No. M–90–51–C]

Arch of West Virginia, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Arch of West Virginia, Inc., P.O. Box 156, Yolyn, West Virginia has filed a petition to modify the application of 30 CFR 77.811 (movement of portable substations and transformers) to its Ruffner Surface Mine (I.D. No. 46–06751) located in Logan County, West Virginia. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that portable substations and transformers be deenergized before they are moved from one location to another.

2. As an alternate method, petitioner proposes to use a rubber-tired, trailer-mounted, portable generator connected with a short length of trailing cable and pulled by a tractor truck to move large electric mining shovels and draglines. The petitioner outlines specific procedures in the petition.

3. In support of this request, petitioner states that this would eliminate excessive exposure of personnel to energized trailing cable which can be damaged from being dragged by equipment over long distances.

4. For these reasons, petitioner requests a modification of the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before May 21, 1990. Copies of the petition are available for inspection at that address.

Dated: April 12, 1990.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 90–9212 Filed 4–19–90; 8:45 am]

BILLING CODE 4510–43–M

[Docket No. M–90–52–C]

Enlow Fork Mining Co.; Petition for Modification of Application of Mandatory Safety Standard

Enlow Fork Mining Company, 1800 Washington Road, Pittsburgh, Pennsylvania 15241 has filed a petition to modify the application of 30 CFR 75.1103–4 (automatic fire sensor and warning device systems; installation; minimum requirements) to its Enlow Fork Mine (I.D. No. 36–07416) located in Green and Washington Counties, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that automatic fire sensor and warning device systems provide identification of fire within each belt flight.

2. In a separate petition (M–90–53–C), petitioner proposes to use air in the belt entry to ventilate active working places and planned longwall panels.

3. As an alternate method, petitioner proposes to install an early warning fire detection system utilizing a low-level carbon monoxide system in all belt entries used as intake aircourses. The petitioner outlines the specific procedures and equipment in the petition.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that provided by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before May 21, 1990. Copies of the petition are available for inspection at that address.

Dated: April 12, 1990.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 90-9213 Filed 4-19-90; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-90-53-C]

Enlow Fork Mining Co.; Petition for Modification of Application of Mandatory Safety Standard

Enlow Fork Mining Company, 1800 Washington Road, Pittsburgh, Pennsylvania 15241 has filed a petition to modify the application of 30 CFR 75.326 (aircourses and belt haulage entries) to its Enlow Fork Mine (I.D. No. 36-07416) located in Greene and Washington Counties, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that intake and return aircourses be separated from belt haulage entries and that belt haulage entries not be used to ventilate active working places.

2. As an alternate method, petitioner proposes to use air in the belt entry to ventilate active working places and planned longwall panels.

3. In support of this request, petitioner proposes to install an early warning fire detection system utilizing a low-level carbon monoxide (CO) detection system in all belt entries used as intake aircourses and at each belt drive and tailpiece located in intake aircourses. The monitoring devices would be capable of giving warning of a fire for four hours after the source of power to the belt is removed, except when power is removed during a fan stoppage or when the belt haulage way is examined.

4. The low-level CO monitoring devices would be capable of providing both visual and audible alarm signals. When the CO system gives a visual or audible signal, the evaluation procedures outlined in an approved mine evacuation plan would be implemented. The fire alarm signal would be activated at an attended surface location where there is two-way communication. This responsible person would notify all working sections and other personnel when the alert and alarm are initiated. The CO system would be capable of identifying any activated sensor, monitoring electrical continuity and detecting electrical malfunctions.

5. The CO system would be visually examined at least once each coal-producing shift and tested weekly to ensure the monitoring system is functioning properly. The monitoring system would be calibrated with known concentratons of CO and air mixtures at least monthly.

6. If the CO monitoring system is deenergized for routine maintenance or for failure of a sensor unit, the belt conveyor would continue to operate and qualified persons would patrol and monitor the belt conveyor using handheld CO detecting devices.

7. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that provided by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before May 21, 1990. Copies of the petition are available for inspection at that address.

Dated: April 12, 1990.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 90-9214 Filed 4-19-90; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-90-3-M]

Giant Cement Co.; Petition for Modification of Application of Mandatory Safety Standard

Giant Cement Company, Post Office Box 218, Harleyville, South Carolina 29448 has filed a petition to modify the application of 30 CFR 56.14211 (blocking equipment in a raised position) to its Giant Plant (I.D. No. 38-00007) located in Dorchester County, South Carolina. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that a raised component of mobile equipment must be secured to prevent accidental lowering when persons are working on or around mobile equipment and are exposed to the hazard of accidental lowering of the component.

2. Petitioner proposes to suspend a work platform (basket) by a cable from the boom of a crane or derrick, as outlined in the OSHA standard, 29 CFR 1926.550.

3. In order to comply with the standard, scaffolding 40 feet high would have to be erected, resulting in an unsafe access to the desired work area. Climbing scaffolding to such heights would result in a diminution of safety for the workers.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before May 21, 1990. Copies of the petition are available for inspection at that address.

Dated: April 12, 1990.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 90-9215 Filed 4-19-90; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-90-54-C]

Southern Light Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Southern Light Coal Company, P.O. Box 1185, Barbourville, Kentucky 40906 has filed a petition to modify the application of 30 CFR 75.313 (methane monitor) to its No. 2 Mine (I.D. No. 15-16682) located in Knox County, Kentucky. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that a methane monitor be installed on electric face cutting equipment, continuous mining machines, longwall face equipment and loading machines. The monitor is required to be properly maintained and frequently tested.

2. As an alternate method, petitioner proposes to use handheld continuous

oxygen and methane monitors instead of methane monitors on three-wheel tractors as outlined in the petition.

3. In support of this request, petitioner states that:

(a) No methane has been detected in the mine;

(b) Each three-wheel tractor would be equipped with a handheld continuous monitoring methane and oxygen detector and all persons would be trained in the use of the detector;

(c) Prior to allowing the coal loading tractor in the face area, a gas test would be performed to determine the methane concentration in the atmosphere. When the elapsed time between trips does not exceed 20 minutes, the air quality would be monitored continuously after each trip. This would provide continuous monitoring of the mine atmosphere for methane to assure the detection of any methane buildup between trips; and

(d) If one percent methane is detected, the operator would manually deenergize the battery tractor immediately. Production would cease and would not resume until the methane level is lower than one percent.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that provided by the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before May 21, 1990. Copies of the petition are available for inspection at that address.

Dated: April 12, 1990.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 90-9216 Filed 4-19-90; 8:45 am]

BILLING CODE 4510-43-M

NATIONAL COMMISSION ON MIGRANT EDUCATION

Meeting

ACTION: Notice of Meeting.

SUMMARY: The National Commission on Migrant Education will hold its fourth meeting on Sunday and Monday, May 6-7, 1990. The Commission was established by Public Law 100-297, April 28, 1988.

DATE, TIME, AND PLACE: Sunday, May 6, 1990, 5 to 8 p.m., Excelsior Hotel, Vinson Room, 3 Statehouse Plaza, Little Rock, Arkansas; Monday, May 7, 1990, 8:30 a.m. to 2:30 p.m., Arch Ford Education Building, Little Rock, Arkansas.

TYPE OF MEETING: Open.

AGENDA: Discussion will be devoted to the Migrant Student Records Transfer System and tour of facility.

For Additional Information: Contact Nancy Watson, 301-492-5336, National Commission on Migrant Education, 8120 Woodmont Avenue, Fifth Floor, Bethesda, Maryland 20814.

Linda Chavez,

Chairman.

[FR Doc. 90-9133 Filed 4-19-90; 8:45 am]

BILLING CODE 6820-DE-M

NATIONAL SCIENCE FOUNDATION

Permits Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permits issued under the Antarctic Conservation Act of 1978, Public Law 95-541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice of permits issued.

FOR FURTHER INFORMATION CONTACT: Charles E. Myers, Permit Office, Division of Polar Programs, National Science Foundation, Washington, DC 20550.

SUPPLEMENTARY INFORMATION: On March 6, 1990, the National Science Foundation published a notice in the **Federal Register** of permit applications received. A permit was issued to the following individual on April 12, 1990: Peter Jorgensen.

Charles E. Myers.

Permit Office, Division of Polar Programs.

[FR Doc. 90-9167 Filed 4-19-90; 8:45 am]

BILLING CODE 7555-01-M

Advisory Panel for Equipment and Facilities for Research at Biological Field Stations and Marine Laboratories; Establishment

The Assistant Director for Biological, Behavioral and Social Sciences has determined that the establishment of the Advisory Panel for Equipment and Facilities for Research at Biological Field Stations and Marine Laboratories [FSML] is necessary and in the public interest in connection with the performance of duties imposed upon the Director, National Science Foundation (NSF), by 42 USC 1861 *et seq.* This determination follows consultation with the Committee Management Secretariat, General Services Administration.

Name of Committee: Advisory Panel for Equipment and Facilities for Research at Biological Field Stations and Marine Laboratories.

Purpose: To review and evaluate proposals submitted to the BBS special competition for Equipment and Facilities for Research at Biological Field Stations and Marine Laboratories.

Balanced Membership Plan: The Advisory Panel will consist of approximately 10 members. Balanced membership is an important objective in the selection of members of the Panel. The members are chosen on the basis of their demonstrated capabilities in scientific research and training activities with the aim of obtaining a reasonable balance of capability in the various fields eligible for support through the FSML program. Careful consideration is also given to the achievement of balance with respect to the age, gender and geographical origin of the membership, and to the enhancement of the participation of minority and disabled scientists.

Responsible NSF Official: Dr. James Edwards, Program Director, Telephone: (202) 357-7332.

Dated: April 17, 1990.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 90-9184 Filed 4-19-90; 8:45 am]

BILLING CODE 7555-01-M

Advisory Committee for Physics; Meeting

The National Science Foundation announces the following meeting:

Name: Advisory Committee for Physics.

Date and Time: May 7, 1990; 9 a.m. to 12 p.m. (Open). 2 p.m. to 5 p.m. (Closed). May 8, 1990; 8:30 a.m. to 5 p.m. (Open).

Place: Room 540, National Science Foundation, 1800 G Street NW., Washington, DC 20550.

Type of Meeting: Part open.

Contact Person: Dr. Marcel Bardon, Director, Division of Physics, room 341, National Science Foundation, Washington, DC 20550, (202) 357-7985.

Minutes: May be obtained from contact person listed above.

Purpose of Meeting: To provide advice and recommendations concerning support for research and education in physics.

Agenda:

Open: May 7, 1990 a.m.—Discussion of FY 1990 and FY 1991 Budgets, Long Range Planning issues, future review topics and other items of interest to the administration of programs of the Division of Physics.

Closed: May 7, 1990, 2 p.m.–5 p.m.—To review and evaluate research proposals.
Open: May 8, 1990 a.m. and p.m.—Continuation of discussions of previous day.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, and personal information concerning individuals associated with the proposals. These matters are within exemptions 4 and 6 of the Government in the Sunshine Act.

Dated: April 17, 1990.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 90–9183 Filed 4–19–90; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Abnormal Occurrence Report; Section 208 Report Submitted to Congress

Notice is hereby given that pursuant to the requirements of section 208 of the Energy Reorganization Act of 1974, as amended, the Nuclear Regulatory Commission (NRC) has published and issued another periodic report to Congress on abnormal occurrences (NUREG–0090, Vol. 12, No. 4).

Under the Energy Reorganization Act of 1974, which created the NRC, an abnormal occurrence is defined as "an unscheduled incident or event which the Commission (NRC) determines is significant from the standpoint of public health or safety." The NRC has made a determination, based on criteria published in the Federal Register (42 FR 10950) on February 24, 1977, that events involving an actual loss or significant reduction in the degree of protection against radioactive properties of source, special nuclear, and by-product material are abnormal occurrences.

The report to Congress is for the fourth calendar quarter of 1989. The report identifies the occurrences or events that the Commission determined to be significant and reportable; the remedial actions that were undertaken are also described.

For this reporting period, there were three abnormal occurrences, none involving a licensed nuclear power plant. The first two abnormal occurrences involved nuclear material licensees. The first involved a medical diagnostic misadministration and the second involved a medical therapy misadministration. The third abnormal occurrence was reported by an Agreement State (Louisiana) and involved an overexposure to an industrial radiographer.

The report also contains information that updates a previously reported abnormal occurrence.

A copy of the report is available for public inspection and/or copying at the NRC Public Document room, 2120 L. Street NW., (Lower Level), Washington, DC 20555, or at any of the nuclear power plant Local Public Document Rooms throughout the country.

Copies of NUREG–0090, Vol. 12, No. 4 (or any of the previous reports in this series), may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Post Office Box 37082, Washington, DC 20013–7082. A year's subscription to the NUREG–0090 series publication, which consists of four issues, is also available.

Copies of the report may also be purchased from the National Technical Information Service, Springfield, VA 22161.

Dated at Rockville, MD, this 16th day of April 1990.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 90–9194 Filed 4–19–90; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 30–30691; License No. 35–26953–01; EA 90–069]

Barnett Industrial X-Ray, Stillwater, OK; Order Modifying License

I

Barnett Industrial X-Ray (Licensee) is the holder of Materials License No. 35–26953–01 which was issued by the NRC pursuant to 10 CFR parts 30 and 34 on December 28, 1988, and which was last amended in its entirety on October 5, 1989. The license authorizes the possession of iridium-192 as sealed sources in various radiography exposure devices for use in industrial radiography in accordance with the conditions specified in the license. The license is scheduled to expire on December 31, 1993.

II

On April 6, 1990, the Licensee's Radiation Safety Officer (RSO), who serves as RSO on a contractual basis, contacted the NRC Operations Center, Bethesda, Maryland, to report an incident that resulted in a radiation exposure to an assistant radiographer that may have significantly exceeded NRC's radiation exposure limits. The RSO reported that the incident occurred during work being performed by a radiographer and assistant radiographer at a refinery in Ardmore, Oklahoma on April 6, 1990. The radiation exposure to the assistant radiographer occurred after a sealed iridium-192 source became disconnected from its drive cable and did not return to the shielded position within the exposure device when the drive cable was retracted following a radiographic exposure. Although required to do so by NRC regulations, neither the radiographer nor the assistant radiographer performed a radiation survey to confirm that the source had returned to the shielded position within the exposure device. The assistant radiographer then disconnected the guide tube from the exposure device, wrapped it around his neck and shoulders and transported the guide tube, with the unshielded source apparently still in it, to another location, unknowingly incurring a significant radiation exposure as a result. When the assistant radiographer arrived at the new location and began preparing for another radiographic exposure, the source fell to the ground. The source was ultimately recovered and was returned to the shielded exposure device by the radiographer. Although the radiographer and assistant radiographer are required to do so by NRC regulations, the assistant radiographer was not wearing a film badge or thermoluminescent dosimeter (TLD), and there is some question as to whether the radiographer was wearing a film badge or TLD. The purpose of the film badge or TLD is to measure the extent of the radiation received. The actual radiation exposure to both individuals and possible health effects are still being evaluated by competent medical practitioners.

NRC's inspection concerning this incident is continuing. Based on NRC's preliminary inquiry, Ray Thomas Croteau, a radiographer employed by Barnett Industrial X-Ray and authorized by License No. 35–26953–01 to act as a radiographer as defined in 10 CFR 34.2, and Michael Porter, an assistant radiographer employed by the same company, failed to conduct radiation surveys following radiographic exposures on April 6, 1990, even though both individuals admitted to the NRC inspector that they knew such surveys were required by NRC regulations (10 CFR 34.43(b)). Further, during radiographic operations on April 6, 1990, Michael Porter did not wear either a film badge or a TLD, and there is some question as to whether Ray Thomas Croteau wore a film badge or TLD. The film badge and TLD are devices that are intended to provide an accurate assessment of exposure to radiation. 10 CFR 34.33(a) requires that such devices

be worn during all radiographic operations.

III

The requirements that Mr. Croteau and Mr. Porter violated in this instance are fundamental to ensuring radiation safety and to monitoring the exposure to radiation incurred by radiographers and their assistants in the course of their work. The sealed sources of radioactivity employed in this work, if used carelessly and without regard to their potential hazard, are capable of causing serious injury and can, in the worst cases, cause death. The failure to meet requirements designed to protect against such injury is unacceptable. Mr. Croteau received training in order to work as a radiographer and Mr. Porter received training in order to work as an assistant radiographer. Radiographers, by definition in 10 CFR 34.2, are responsible for assuring compliance with Commission requirements. Consequently, I lack the requisite reasonable assurance that Mr. Croteau and Mr. Porter will conduct activities under License No. 35–26953–01 in compliance with the Commission's requirements and that the health and safety of the public, including the Licensee's employees, will be protected. Therefore, pending further inspection by the NRC, the public health, safety, and interest require that License No. 35–26953–01 be modified to prohibit Ray Thomas Croteau from acting as a radiographer as defined in § 34.2, 10 CFR part 34, and to prohibit both Mr. Croteau and Mr. Porter from engaging in any activities performed under the authority of this license. Furthermore, pursuant to 10 CFR 2.201(c), no prior notice is required and, pursuant to 10 CFR 2.204, I find that the public health, safety and interest require that this Order be immediately effective.

IV

Accordingly, pursuant to Sections 81, 161b, 161i, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.204 and 10 CFR parts 30 and 34, *It is hereby ordered,* effective immediately, That License No. 35–26953–01 is modified as follows:

A. License Condition 12 is amended by removing Ray Thomas Croteau from the list of individuals authorized to act as radiographers as that term is defined in § 34.2, 10 CFR part 34.

B. Ray Thomas Croteau and Michael Porter are prohibited from engaging in any activities subject to NRC requirements.

The Regional Administrator, NRC Region IV, may, in writing, relax or rescind any of the above conditions upon demonstration by the Licensee of good cause.

V

The Licensee or any other person adversely affected by this Order may submit an answer to this Order within 20 days of the date of this Order. The answer may set forth the matters of law upon which the licensee or other person adversely affected relies and the reasons as to why the Order should not have been issued. An answer filed within 20 days of the date of this Order may also request a hearing. Any answer or request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Chief, Docketing and Service Section, Washington, DC 20555. Copies of the hearing request and answer also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Hearings and Enforcement at the same address, and to the Regional Administrator, Region IV, 611 Ryan Plaza Drive, Arlington, Texas 76011. If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d). In the absence of any request for a hearing within the specified time, this Order shall be final without further Order or proceedings. A request for a hearing shall not stay the immediate effectiveness of this order.

If a hearing is requested by the Licensee or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Dated at Rockville, Maryland, this 12th day of April 1990.

For the Nuclear Regulatory Commission.

Hugh L. Thompson, Jr.,

Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support.

[FR Doc. 90–9193 Filed 4–19–90; 8:45 am]

BILLING CODE 7590–01–M

Materials Licensee Economic Risk of Contamination Cleanup Costs; Availability

AGENCY: Nuclear Regulatory Commission.

ACTION: Availability of NUREG/CR–5381, SAND 89–1302.

SUMMARY: The Nuclear Regulatory Commission has published NUREG/CR–5381, SAND 89–1302 entitled, "Economic Risk of Contamination Cleanup Costs Resulting from Large Nonreactor Nuclear Material Licensee Operations."

ADDRESSES: Copies of NUREG/CR–5381, SAND 89–1302 may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013–7082. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

FOR FURTHER INFORMATION CONTACT: Louis M. Bykoski, Division of Low-Level Waste Management and Decommissioning, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 492–0572

SUPPLEMENTARY INFORMATION: This publication discusses and analyzes several potential incident scenarios involving the accidental release of radioactive material at five reference, nonreactor nuclear material licensees' sites. The economic risk ($/licensee/yr) of decontamination is evaluated for each reference licensee. Although most releases and cleanup costs are minor, some less frequent incidents may result in very high cleanup costs that dominate the economic risk of decontamination of a particular licensee. The economic risk for the five plants ranged from a low of $14,000 per licensee per year to a high of $104,000 per licensee per year. This report is the second of two reports by Sandia National Laboratories on the economic risk of nonreactor nuclear material licensee operations.

Dated at Rockville, Maryland, this 12th day of April, 1990.

For the Nuclear Regulatory Commission.

Timothy C. Johnson,

Acting Chief, Regulatory Branch, Division of Low-Level Waste Management and Decommissioning, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 90–9192 Filed 4–19–90; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–220]

Niagara Mohawk Power Co.; Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment

to Facility Operating License No. DPR–63, issued to the Niagara Mohawk Power Corporation (the licensee), for operation of the Nine Mile Point Nuclear Station, Unit 1, located in Oswego County, New York.

The amendment would revise Technical Specification Table 3.3.4, "Primary Containment Isolation Valves Lines Entering Free Space of the Containment" to reflect that the isolation valves in the drywell and in the suppression chamber oxygen sampling lines are normally in the "open" position instead of the currently designated "closed" position.

The combustible gas control system provides the means to inject nitrogen gas into the containment so that the oxygen concentration during operation is maintained below a limit that would allow a combustible hydrogen oxygen concentraton to form following a loss of coolant accident. The oxygen sampling system is necessary to determine that this limit has been reached shortly after startup and is maintained during operation. The isolation valves in the oxygen sampling lines are maintained in a normally open position to allow this monitoring instead of the normally closed position currently indicated by the Technical Specifications. Therefore, the licensee proposes to change Table 3.3.4 to correct this inadvertent error in the designation of the normal position of the isolation valves during operation. No change in the design of the valves or their actuation logic or their capability to be operated in response to accident conditions is involved.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards considerations. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The licensee has provided the following analysis.

The operation of Nine Mile Point Unit 1, in accordance with the proposed amendment, will not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes do not involve a significant increase in the probability or consequence of an accident previously evaluated. The oxygen sampling containment isolation valves were designed to be open during normal operation (and have been during previous operation) to allow continuous monitoring of the containment. The isolation valves will close as designed, on a LOCA signal assuring containment integrity.

The operation of the Nine Mile Point Unit 1, in accordance with the proposed amendment, will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated because the proposed changes introduce no new mode of plant operation nor do they require physical modification to the plant.

The operation of Nine Mile Point Unit 1, in accordance with the proposed amendment, will not involve a significant reduction in a margin of safety.

The oxygen sampling containment isolation valves are normally open to allow continuous monitoring of the containment. This revision is required so Technical Specifications accurately reflect current plant practice and system design requirements. The isolation valves will close on a LOCA signal assuring containment integrity. Therefore, the proposed amendment will not involve a significant reduction in a margin of safety.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore the staff proposes to determine that the application for amendment involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Written comments may be submitted by mail to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice.

Written comments may also be delivered to room P–223, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland from 7:30 a.m. to 4:15 p.m. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC. The filing of requests for hearing and petitions for leave to intervene is discussed below.

By May 21, 1990, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555 and at the Local Public Document Room located at the Reference and Documents Department, Panfield Library, State University of New York, Oswego, New York 13126. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendments under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards considerations. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards considerations, the Commission may issue the amendment and make it effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves significant hazards considerations, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period, such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards considerations. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish a notice of issuance and provide for opportunity for hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1–(800) 325–6000 (in Missouri 1–(800) 342–6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Robert A. Capra: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Mr. Troy B. Conner, Jr., Esquire, Conner & Wetterhahn, Suite 1050, 1747 Pennsylvania Avenue NW., Washington, DC 20006, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated March 27, 1990, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Stret NW., Washington, DC 20555, and at the Local Public Document Room, Reference and Documents Department, Penfield Library, State University of New York, Oswego, New York 13126.

Dated at Rockville, Maryland, this 11th day of April 1990.

For the Nuclear Regulatory Commission.

Robert E. Martin,

Senior Project Manager, Project Directorate I–1, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 90–9188 Filed 4–19–90; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–346]

Toledo Edison Co.; Consideration of Issuance of Amendment to Facility Operating License and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–3, issued to the Toledo Edison Company (the licensee), for operation of the Davis-Besse Nuclear Power Station, Unit No. 1, located in Ottawa County, Ohio.

The amendment would change License Condition 2.C(4) to reflect the revision by the licensee of certain prior commitments it made regarding fire protection measures at the Davis-Besse facility. Specifically, the licensee is now proposing to achieve an equal degree of fire protection through alternate methods for some of these fire protection measures. The original commitments were reviewed by the NRC staff and found acceptable; this review was documented in the staff's Fire Protection Safety Evaluation (SE) dated July 26, 1979. These prior commitments were summarized in Table 1 of the subject SE and incorporated into the license by reference in License Condition 2.C(4) by Amendment No. 18. While this license condition was later revised slightly by Amendment No. 24, the basic commitments regarding fire protection measures remained a condition of the license.

Prior to issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By May 21, 1990, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for hearing and a petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for

Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555 and at the Local Public Document Room located at University of Toledo Library, Documents Department, 2801 Bancroft Avenue, Toledo, Ohio 4606. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularly the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first pre-hearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene, which must include a list of the contentions that are sought to be litigated in the matter. Each contention must consists of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing.

The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issued of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitled the petitioner to relief. A petitioner who fails to file a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 2120, L Street NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1–800–325–6000 (in Missouri 1–800–342–6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to John N. Hannon: petitioner's name and telephone number; date petition was mailed: plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Gerald Charnoff, Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

If a request for hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its intent to make a no significant hazards consideration finding in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment dated March 22, 1990, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555, and at the University of Toledo Library, Documents Department, 2801 Bancroft Avenue, Toledo, Ohio 43606.

Dated at Rockville, Maryland, this 13th day of April 1990.

For the Nuclear Regulatory Commission.

John N. Hannon,

Director, Project Directorate III–3, Division of Reactor Projects—III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 90–9189 Filed 4–19–90; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–247; License No. DPR–26; EA 89–200]

Consolidated Edison Co. Indian Point, Unit 2; Order Imposing a Civil Monetary Penalty

I

Consolidated Edison Company, the (the "licensee") is the holder of License No. DPR–26 (the "license") issued by the Nuclear Regulatory Commission (the "Commission" or "NRC") on September 28, 1973 which authorizes the licensee to operate the Indian Point, Unit 2, facility, in Buchanan, New York in accordance with the conditions specified therein.

II

An NRC safety inspection of the licensee's activities under the license was conducted at the licensee's facility on September 18–21, 1989. The results of the inspection indicated that the licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty was served upon the licensee by letter dated December 26, 1989. The Notice stated the nature of the violation, the provisions of the Nuclear Regulatory Commission's requirements

that the licensee had violated, and the amount of the civil penalty proposed for the violation. The licensee responded to the Notice by a letter dated January 25, 1990. In its response, the licensee admits that the violation occurred but requests mitigation of the penalty.

III

Upon consideration of the licensee's response and the statement of facts, explanations, and argument contained therein, the NRC staff has determined as set forth in the Appendix to this Order, that the violation occurred as stated and that the penalty proposed for the violation designated in the Notice should be imposed.

IV

In view of the foregoing and pursuant to section 234 of the Atomic Energy Act of 1954, as amended (Act) 42 U.S.C. 2282, and 10 CFR 2.205, *It is Hereby Ordered That:* The licensee pay a civil penalty in the amount of $50,000 within 30 days of the date of this Order, by check, draft, or money order, payable to the Treasurer of the United States and mailed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555.

V

The licensee may request a hearing within 30 days of this order. A request for a hearing shall be clearly marked as a "Request for an Enforcement Hearing" and shall be addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555. A copy of the hearing request shall also be sent to the Assistant General Counsel for hearings and Enforcement, Office of the General Counsel, USNRC, Washington, DC 20555, with a copy to the Regional Administrator, Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406.

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the licensee fails to request a hearing within 30 days from the date of this Order, the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the licensee requests a hearing as provided above, the issue to be considered at such hearing shall be whether, on the basis of the violation admitted by the Licensee, this Order should be sustained.

Dated at Rockville, Maryland this 10th day of April, 1990.

Hugh L. Thompson, Jr.,

Deputy Executive Director for Nuclear Materials Safety, Safeguards and Operations Support.

Appendix—Evaluation and Conclusion

On December 26, 1989, a Notice of Violation and Proposed Imposition of Civil Penalty was issued to Consolidated Edison Company for a violation of emergency preparedness requirements at Indian Point, Unit 2. The licensee responded to the Notice with a letter, dated January 25, 1990, and admitted that the violation occurred, but requested mitigation of the civil penalty. The NRC's evaluation and conclusion regarding the licensee's response are as follows:

1. Restatement of Violation

10 CFR 50.54(q) requires, in part, that the licensee follow and maintain in effect emergency plans which meet the standards in 10 CFR 50.47(b) and the requirements of 10 CFR part 50, appendix E, and not implement changes that decrease the effectiveness of an approved emergency plan without application to, and approval by, the Commission.

10 CFR 50.47(b)(4) requires, in part, that emergency response plans must have a standard emergency classification and action level scheme, the bases of which include facility systems and effluent parameters. 10 CFR part 50, appendix E, section IV.B (Assessment Actions) requires, in part, that the emergency plans include Emergency Action Levels (EALs) that are to be used for determining when and what type of protective measures should be considered, and which shall be based on in-plant conditions and instrumentation in addition to onsite and offsite monitoring.

Contrary to the above, a change was made to the approved emergency plan on December 2, 1988, without first applying for, and receiving, NRC approval of the change. This change decreased the effectiveness of the plan by revising the emergency classification and action level scheme set forth in Emergency Plan Procedure IP–1024, "Emergency Classification" such that the resulting emergency classification and action level scheme no longer adequately included consideration of effluent parameters, offsite monitoring, and other plant conditions. For example:

1. Offsite monitoring was not considered in event classification except for action levels involving the declaration of an Alert or an Unusual Event. As a result, conditions that would have resulted in a declaration of General Emergency under the approved plan would have only been declared an Unusual Event under the revised scheme.

2. For certain plant conditions involving a major internal or external event (such as: (1) A fire or earthquake substantially beyond design, which could cause massive common damage to plant systems, or (2) a loss of physical control of the facility (e.g., sabotage)), the revised emergency classification scheme would only warrant declaration of an Unusual Event rather than a General Emergency, which would have been declared under the previously approved plan.

This is a Severity Level III violation. (Supplement VIII) Civil Penalty—$50,000

2. Summary of Licensee Response

The licensee, in its response, acknowledges the circumstances and events set forth in the Notice, and provides a history of these circumstances prior to, and after, the change to the EALs, so as to describe the licensee's motives. The licensee stated that a visit to INPO offices produced information on a barrier-based approach which had been adopted by other licensees. Further, the licensee indicated that it thought the emergency classification scheme was improved when the changes were made in December 1988, and therefore, did not believe the changes required NRC approval. The licensee now acknowledges that such approval was required.

Notwithstanding the admission of the violation, the licensee requests mitigation of the penalty, claiming that (1) prompt and thorough corrective actions were taken, and (2) its past performance in the emergency preparedness area is good, and this event was an isolated interruption in a pattern of otherwise good past performance and successful accomplishment in the area of emergency preparedness.

In support of the contention that the corrective actions were prompt and thorough, the licensee states that, once it understood the NRC position concerning this matter in June 1989, a commitment was made to perform necessary revisions to the EALs within 60 days. Further, the licensee indicates that the procedure was revised by August 1989, related materials and procedures were distributed, and training was conducted. The licensee also indicates that administrative controls were instituted, and these controls require a formalized pre-implementation determination of the

effectiveness of any change to the emergency plan.

The licensee also contends that the effectiveness of the corrective action should be judged from June 1989, and not January 1989, notwithstanding NRC letters dated January 31, and May 23, 1989 (which raised the issue of whether lower level classification of "example" events constituted a degradation of plan effectiveness). The basis for this licensee contention is that the licensee had no indication that literal adherence to NUREG 0654 examples should be deemed a regulatory necessity.

In support of the contention that the enforcement history in the emergency preparedness area has been good, the licensee claims that this occurrence was an isolated interruption in an otherwise successful program. Further, the licensee describes a number of initiatives in the emergency preparedness area, including development of a model verification capability for the alert and notification system, and working closely with offsite personnel to enhance response capabilities.

3. NRC Evaluation of the Licensee's Response

After reviewing and evaluating the licensee's response, the NRC concludes that (1) the licensee's corrective actions were neither prompt nor thorough, and (2) the licensee's past performance in the emergency preparedness area does not justify mitigation of the penalty.

With respect to the licensee's statement that information available at INPO suggests that other licensees have adopted barrier-based approaches, the NRC is not aware of any EAL classification scheme which is solely barrier-based, although there are some that integrate aspects of this approach with an event-based scheme, thereby overcoming the weaknesses of a pure barrier-based classification scheme.

The NRC disagrees with the licensee's contention that the corrective actions were prompt and thorough. In a letter to the licensee dated January 31, 1989, the NRC stated that "Pure barrier-based EAL schemes have been found to fall short of meeting the regulatory guidance . . ." and that a review of this licensee's revised EAL classification system "indicates that several types of events or emergencies identified in NUREG–0654 would be classified at a lower level than specified in NUREG–0654 *or under your previous EAL classification system* [emphasis added], thereby resulting in a decrease in the effectiveness of your Plan." The letter explained that this decrease in effectiveness created the potential for a lack of proper response from either the NRC or the State/Local Governments.

In spite of this, the licensee took no action and was advised again by the NRC, in a letter dated May 23, 1989, that "Revision 5 [of the licensee's Radiological Emergency Plan] is presently not an acceptable alternative to the published guidance in NUREG–0654." This letter concluded that "it is our [NRC's] understanding that you will change Revision 5 so that your EAL classification scheme is in conformance with existing regulations and guidance." The licensee did not take initial corrective actions until June 1989, and these were not adequate, necessitating subsequent changes which were completed on August 15, 1989. Based on the foregoing, there is no reason to conclude that the actions taken by the licensee to correct the problem were prompt enough to warrant mitigation of this civil penalty.

The NRC maintains that the licensee's past performance provides no basis for mitigation because (1) the SALP rating in this area for the past three SALP periods has been Category II, and (2) deficiencies in the area of event classification had been identified during three successive emergency preparedness exercises at Indian Point 2 since 1986.

4. NRC Conclusion

The licensee has not provided a sufficient basis for mitigation of the amount of the civil penalty. Therefore, the NRC concludes that a civil penalty in the amount of $50,000 should be imposed.

[FR Doc. 90–9191 Filed 4–19–90; 8:45 am]
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Docket No. 50–331

Iowa Electric Light and Power Co. et. al.; Environmental Assessment and Finding of No Significant Impact

In the matter of Iowa Electric Light and Power Co., Central Iowa Power Cooperative, and Corn Belt Power Cooperative:

The U.S. Nuclear Regulatory Commission (the staff) is considering issuance of an amendment to Facility Operating License No. DPR–49, issued to Iowa Electric Light and Power Company, et al. (the licensee), for operation of the Duane Arnold Energy Center (DAEC), located in Linn County, Iowa.

Environmental Assessment

Identification of Proposed Action

The proposed amendment would extend the expiration date of the Facility Operating License No. DPR–49 for DAEC. The current expiration date of June 21, 2010 would be changed to February 21, 2014. This action is in response to the licensee's application dated June 10, 1988.

The Need for the Proposed Action

The proposed change to the Facility Operating License is required in order to provide the licensee with approximately 3 years and 8 months (3.6 years) of additional operating life for DAEC. This would allow 40 years of operation from the issuance date of the operating license rather than from the issuance date of the construction permit.

Environmental Impacts of the Proposed Action

The staff has reviewed the potential environmental impact of the proposed change in the expiration date of the DAEC Facility Operating License. This evaluation considered the "Final Environmental Statement Related to Operation of Duane Arnold Energy Center" (FES) issued during March 1973, and recent staff policy. The staff's FES assessed the potential environmental impacts of operating DAEC for 40 years. The staff's assessment has considered the effects of operating experience and environmental changes upon the staff's conclusions set forth in the FES. The staff finds there are no environmental effects not bounded by and assessed in the FES issued in March 1973. No significant adverse environmental effects would result from extending the Facility Operating License for an additional 3 years and 8 months.

The staff reviewed the proposed license extension with regard to the radiological impacts. The population in the vicinity of the DAEC has increased slightly, but far less than originally projected. The actual population within 50 miles of the DAEC site in 1980 was 575,806, based on data obtained from the U.S. Department of Commerce, Bureau of the Census. This represents an actual 4.7% increase from 1970, much lower than the 12.7% increase predicted in the FES over that period. In addition, the FES predicted that the 2010 population within 50 miles of the site would be 952,106. More recent projects by the U.S. Department of Commerce, Bureau of Economic Analysis, based on the actual 1980 population and revised growth rate assumptions, predict that the population in that area will only reach 712,000 by the year 2030. Therefore, the expected population increase and any resulting impact during the period of the license extension are conservatively bounded by the original FES projections. The site

requirements of 10 CFR part 100 are now and would still be met with regard to Exclusion Area Boundary, Low Population Zone, and nearest population center distances.

The environmental impacts attributable to the uranium fuel cycle would be bounded as set forth in Table S–3 of 10 CFR part 51. The environmental impacts attributable to transportation of fuel and waste to and from DAEC would continue to be as described in the FES and are bounded by Table S–4 of 10 CFR part 51.

The additional period of plant operation would not significantly affect the probability or consequences of any reactor accident. Station radiological effluents to unrestricted areas during normal operation have been typically lower than estimated in the FES and have been within the staff's regulations regarding as-low-as-reasonably-achieveable (ALARA) limits, and are indicative of future releases. The proposed additional years of facility operation would not increase the annual public risk from reactor operation.

The licensee complies with staff guidance and requirements for keeping occupational radiation exposure ALARA. According to NUREG–0713, the average dose equivalent has been lower at DAEC than the U.S. boiling water reactor (BWR) plant average for 8 of 10 years in the period 1976 through 1985. Moreover, the average annual dose for this 10-year period is approximately 25% lower than the comparable average for all U.S. BWRs. The DAEC collective dose per megawatt-year has been lower than the U.S. BWR average 6 of 10 years for the same reporting period. The licensee is striving for further dose reductions in accordance with ALARA principles. The staff concludes that DAEC can be operated for an additional 3.6 years within the staff's regulatory requirements and guidance for occupational radiation exposure.

Accordingly, the staff concludes that this proposed action would result in no significant radiological environmental impact.

With regard to the nonradiological impacts, the proposed extension of the Facility Operating License will not cause a significant increase in the nonradiological impacts and will not change any conclusions reached by the staff in the FES. Therefore, the staff concludes that there are no significant nonradiological environmental impacts associated with the proposed amendment.

The "Notice of Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing" in connection with this action was published in the **Federal Register** on August 9, 1989 (54 FR 32712). No request for hearing or petition for leave to intervene was filed following this notice.

Alternatives to the Proposed Action

The principal alternative would be to deny the proposed license extension, requiring that DAEC shut down upon expiration of the present operating license. However, since the staff concludes that no significant environmental effects would result from the proposed action, and the alternative energy acquisition and cost/benefit analysis found in the FES remain valid, there is no need to further evaluate alternatives to the proposed action.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the DAEC FES issued in March 1973.

Agencies and Persons Consulted

The staff reviewed the licensee's request and consulted with a state technical representative on August 7, 1989 regarding the proposed no significant hazards consideration determination made with respect to the requested license extension.

Finding of No Significant Impact

The staff has determined not to prepare an environmental impact statement for the proposed extension of Facility Operating License No. DPR–49. Based upon the foregoing environmental assessment, the staff concludes that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the licensee's application for license extension dated June 10, 1988 and the "Final Environmental Assessment Related to the Operation of Duane Arnold Energy Center" issued in March 1973. The documents are available for public inspection at the U.S. Nuclear Regulatory Commission's Public Document room 2120 L Street NW., Washington, DC 20555, and at the Cedar Rapids Public Library, 500 First Street SE., Cedar Rapids, Iowa 52401.

Dated at Rockville, Maryland, this 13th day of April 1990.

For The Nuclear Regulatory Commission.

John N. Hannon,

Director, Project Directorate III–3, Division of Reactor Projects—III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 90–9190 Filed 4–19–90; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–27904; File No. SR–DTC–89–22]

Self-Regulatory Organizations; Order Approving Change by The Depository Trust Company, Relating to Access to the Mutual Fund Settlement, Entry and Registration Verification Service

On December 21, 1989, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR–DTC–89–22) under section 19(b)(1) of the Securities Exchange Act of 1934, as amended ("Act"). [1] The proposed rule change relates to DTC's linkage with the National Securities Clearing Corporation's ("NSCC") Mutual Fund Settlement, Entry and Registration Verification Service ("Fund/SERV"). [2] On February 1, 1990, the Commission published notice of the proposal in the **Federal Register**.[3] The Commission did not receive any letters of comments. For the reasons discussed below, the Commission is approving the proposed rule change.

I. Description of the Proposed Rule Change

The proposed rule would enhance DTC's linkage with NSCC's Fund/SERV by allowing NSCC members who are not direct Fund/SERV participants to access this service through DTC.[4] Pursuant to the proposed enhancement, DTC would allow access to the Fund/SERV system through the Participant Terminal System ("PTS") network. [5]

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[1] 15 U.S.C. 78s(b)(1) (1989).

[2] Fund/SERV is a centralized, automated processing system for mutual fund purchases and redemptions. On November 20, 1987, the Commission approved NSCC's proposal to amend its rules and procedures in order to offer Fund/SERV as a permanent service to its participants. Securities Exchange Act Release No. 25416 (November 20, 1987), 52 FR 45418 (November 27, 1987).

[3] Securities Exchange Act Release No. 27644 (January 25, 1990), 55 FR 3504 (February 1, 1990).

[4] On July 24, 1989, the Commission approved a change to DTC's Rules and Procedures, allowing DTC participants, who were not already Fund/SERV members, access to NSCC's Fund/SERV, Securities Exchange Act Release No. 27056 (July 24, 1989), 54 FR 31752 (August 1, 1989).

[5] DTC's PTS network is an electronic system that permits direct communication between DTC and its participants, enabling participants to effect book-entry movements and other account related activities via remote terminal. On December 30, 1983, the Commission approved DTC's use of the PTS network. Securities Exchange Act Release No. 20519 (December 30, 1983), 49 FR 966 (January 6, 1984). DTC has represented to the Commission that the PTS network is capable of handling the participation increase resulting from the approval of

Continued

Except for the settlement of transactions, the proposal does not modify the time frames or procedures established pursuant to the original Fund/SERV Linkage Agreement between DTC and NSCC.[6] NSCC participants using the proposed enhancement to communicate mutual fund purchase and redemption orders and DTC's transmission of these orders to NSCC will, therefore, follow the processing schedule prescribed pursuant to the Agreement. DTC, moreover, will not verify the accuracy of the information transmitted to or from NSCC.

Unlike the regular linkage settlement procedures,[7] the proposal does not require DTC to settle directly with NSCC any of the transactions processed through the proposed system enhancement. Instead, settlement of transactions communicated through PTS pursuant to this proposal will occur between NSCC and the user of the proposed service, at NSCC, according to NSCC's Rules. For this reason, DTC will not require users to make any deposits to its Next Day Funds Settlement Fund.

The proposal sets a fee for the proposed service. DTC will charge a monthly usage charge of $5.00. In addition, DTC will charge $.25 for each transaction involving a mutual fund order entry, settlement and/or registration.[8]

this proposal. Letter from Karen G. Lind, Associate Counsel, DTC, to Julius R. Leiman-Carbia, Staff Attorney, Division of Market Regulation, Commission (March 15, 1990).

[6] DTC-NSCC Fund/SERV Linkage Agreement (June 29, 1989); Securities Exchange Act Release No. 27056, *supra* note 4 at 31752–53.

[7] *See* DTC-NSCC Fund/SERV Linkage Agreement, supra note 6 at § 3; *see also* Securities Exchange Act Release No. 27056, *supra* note 4 at 31752.

[8] Pursuant to the proposal, NSCC will collect the described fees and remit them to DTC. Under NSCC's Rules and Procedures, however, NSCC may only collect DTC's fees from participants who have DTC accounts sponsored by, and under the jurisdiction of, NSCC ("sponsored accounts"). *See* NSCC Rules and Procedures, Proc. IX.B. (October 1, 1978 revised December 8, 1989). In order to be able to collect DTC's fees from NSCC participants who do not have sponsored accounts, NSCC will have to file a rule proposal, pursuant to section 19(b)(1) of the Act, 15 U.S.C. § 78s(b)(1), regarding the collection and payment to DTC of the proposed fees. Letter from Karen G. Lind, Associate Counsel, DTC, to Julius Leiman-Carbia, Staff Attorney, Division of Market Regulation, Commission (April 10, 1990).

In addition to the proposed fees, users of the enhancement will have to pay the ordinary costs associated with the use of the PTS network, such as the $.06 charge for PTS inquiries. In order to connect with the PTS network, a participant must own a personal computer and a printer. In addition, a participant must pay a $100.00 monthly subscription fee plus telephone line charges and taxes. See Letter from Karen G. Lind, supra note 5.

II. DTC's Rationale for the Proposed Rule Change

According to DTC, the proposed rule change will provide access to the Fund/SERV system for smaller NSCC participants, who might otherwise find it too expensive to become direct Fund/SERV participants.[9] For this reason, DTC believes, the proposal promotes the efficient settlement of trades and redemptions of mutual fund shares, and, therefore, is consistent with section 17A of the Act.[10]

III. Discussion

The Commission believes that DTC's proposal is consistent with section 17A of the Act because it facilitates the use of new data processing and communication techniques to encourage the development of uniform standards and procedures for the clearance and settlement of mutual fund purchase and redemption orders. As the Commission has stated before, Fund/SERV achieves more efficient, effective and safer procedures for the clearance and settlement of mutual fund transactions by offering one centralized processing location where mutual fund purchase and redemption orders are submitted in one standardized format.[11]

DTC's proposal will allow smaller NSCC participants, who otherwise would not have access to Fund/SERV, to eliminate multiple communication and settlement arrangements between themselves and mutual fund processors. This simplification will in turn reduce the risks of failed deliveries, inadequate transaction records, operational errors and, ultimately, financial insolvency.[12] Thus, the Commission believes that the proposed enhancement to DTC and NSCC's Fund/SERV Linkage Agreement will encourage the widespread use of more efficient means of communication between broker-dealers and mutual fund processors, which will in turn result in more efficient, effective and safer procedures for the clearance and settlement of mutual fund transactions.[13]

[9] DTC's Proposed Rule Change, Form 19b–4 at 3.

[10] 15 U.S.C. 78q–1.

[11] *See* Securities Exchange Act Release No. 24088, (February 10, 1987), 52 FR 5228, 5230–31 (February 19, 1987); Securities Exchange Act Release No. 26506 (January 31, 1989), 54 FR 6051, 6052 (February 7, 1989).

[12] See Securities Exchange Act Release No. 24088, *supra* note 11 at 5230.

[13] The Commission, moreover, agrees that the proposal will impose little, if any, additional financial risk to DTC, because settlement of transactions processed through the proposed service will occur between the user of the proposed service and NSCC (at NSCC, according to NSCC's Rules), rather than between DTC and NSCC, as required under the regular Fund/SERV linkage service.

The Commission also believes that DTC's proposed rule change will further the development of a National Clearance and Settlement System ("National System").[14] The proposal encourages settlement of mutual fund transfers in a clearing agency environment, thus contributing to reduce physical movements of certificates in connection with transfer settlements among broker-dealers.[15]

DTC will charge participants a fee to cover any expenses incurred by DTC in the course of facilitating access to the proposed service. The Commission believes that, as required by section 17A(b)(3)(D) of the Act,[16] the proposed fee is reasonable and equitably allocated, since it will only affect the beneficiaries of the service for which the proposed charge is being assessed.

IV. Conclusion

For the reasons discussed in this Order, the Commission finds that the proposal is consistent with section 17A of the Act.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[17] that the proposed rule change, SR–DTC–89–22, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. 17 CFR 200.30–(12) (1989).

Dated: April 13, 1990.

Jonathan G. Katz,

Secretary.

[FR Doc. 90–9164 Filed 4–19–90; 8:45 am]

BILLING CODE 8010-01-M

[14] Section 17A(a)(2), 15 U.S.C. 78q–1(a)(2), directs the Commission to use its authority to facilitate the establishment of a National System in order to, not only "bolster sagging investor confidence but also to assure that the country maintains a strong, effective and efficient capital raising and capital allocating system in the years ahead." SEN. REP. NO.75, 94th Cong., 1st Sess. 3 (1975).

[15] *See* Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920, 41923 (June 23, 1980).

[16] 15 U.S.C. 78q–1(b)(3)(D).

[17] 15 U.S.C. 78s (b) (2).

[Rel. No. 34–27900; File No. SR–NASD–90–3]

Self-Regulatory Organizations; Notice of Proposed Rule Change by National Association of Securities Dealers; Inc. Relating to Assessment of Fees Under the NASD Code of Arbitration Procedure

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on March 26, 1990 the National Association of Securities Dealers, Inc. ("NASD"or "Association") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in

Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD proposes to amend part III, sections 13, 30, 43, and 44 of its Code of Arbitration Procedure to modify the procedures and schedules under which fees are assessed for the use of arbitration facilities

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

On September 19, 1989, following favorable recommendation by the NASD's National Arbitration Committee, the Association's Board of Governors authorized the filing of a rule change to Sections 30, 43 and 45 of the Association's Code of Arbitration Procedure ("Code") which would have increased arbitration fees under the pre-existing administrative framework set forth in those Sections. On October 12, 1989, in SR–NASD–89–47, the Association filed the proposed rule change to Sections 30, 43 and 45. At the request of the Commission staff, SR–NASD–89–47 was withdrawn on October 17, 1989, and consideration of an alternative administrative framework for the assessment of fees in NASD arbitration proceedings was initiated.

On January 12, 1990, SR–NASD–89–47, Amendment No. 1 was filed by the Association, setting forth an initial statement of the alternative administrative framework. At the request of the Commission staff, this filing was redesignated by the Association as SR–NASD–90–3 on January 17, 1990.

Following receipt of Commission staff comment dated March 8, 1990, and following substantial progress toward the development of a proposed uniform rule increasing fees and incorporating the alternative administrative framework for the assessment of fees in arbitration proceedings involving customers by a Drafting Subcommittee of the Securities Industry Conference on Arbitration ("SICA"), the NASD submits the instant proposed rule change to Sections 13, 30, 43, and 44 of the NASD Code of Arbitration Procedure. In general, the proposed rule changes are intended to discourage successive adjournments of arbitration hearings and to implement revised procedures and schedules for the assessment of fees in arbitrations brought by or against customers as well as in intra-industry arbitrations.

(1) *Adjournments:* Section 30 of the Code of Arbitration Procedure currently provides for the assessment of an adjournment fee of $100 upon a party requesting and receiving an adjournment after the appointment of arbitrators to the case. The proposed rule change, which is based on a proposal endorsed by SICA on May 23, 1989, would raise the adjournment fee assessed following the grant of an initial request for adjournment from $100 to an amount equal to the initial hearing session deposit. The adjournment fee for second and subsequent adjournments requested by the same party would be twice the initial hearing session deposit, but such fee could not exceed $1,000. Should the arbitrators receive a third request for adjournment, to which all parties have consented, the arbitrators would be empowered to dismiss the arbitration without prejudice to the Claimant's filing of a new arbitration action. The proposed rule is expected to reduce delays by discouraging frivolous requests for adjournments in the arbitration process and to encourage more efficient use of this process by parties to arbitration proceedings. Adjournments are the single most significant cause of delays in resolving disputes and result in the lengthening of the overall processing time for arbitration cases.

(2) *Revised Framework for the Assessment of Fees:* The NASD has determined to amend Sections 13, 43, and 44 of the Code, adopting a revised administrative framework for the assessment of fees based on the establishment of a non-refundable filing fee plus fees assessable based on the number of hearing sessions held, in amounts varying in accordance with the amount in dispute. The revised framework set forth in proposed Sections 43 and 44, which requires the deletion of current Section 44 and conforming amendment of current Section 13, is based on a proposal limited to disputes involving customers, which has been prepared by a Drafting Subcommittee of SICA composed of a public member of SICA and arbitration officials of the NASD and New York and American Stock Exchanges. The Drafting Subcommittee's proposal, which has been prepared in the form of a uniform SICA rule, will be presented for consideration by SICA on April 11, 1990. The proposed rule change to Section 44, including the fee schedule set forth therein which is identical to the schedule of fees for industry claimants under the proposed SICA uniform rule, utilizes the same revised administrative framework set forth in the proposed SICA uniform rule.

(3) *Establishment of Non-refundable Filing Fees:* The proposed fee schedules for customer claims (proposed Section 43), industry claims against customers (proposed Section 43), and intra-industry claims (proposed Section 44) incorporate a non-refundable filing fee in all cases. While member firms are required under current Section 44 to pay a non-refundable filing fee of $500.00 when filing against a non-member, and will continue to be so required in the same amount under proposed Section 43, the proposed non-refundable filing fees applicable to customer claimants and intra-industry claimants are new. The non-refundable filing fee, which is intended to recoup certain fixed administrative costs related to each filing, is distinguishable from the hearing session deposit, which is intended to relate to hearing costs, not the administrative costs relating to the processing of filings. These filing fees, which are analogous to court filing fees, are intended to offset some of the NASD's costs of administration, at least to a limited degree, even when cases settle prior to hearing. The proposed filing fees for customer claims, which range on a sliding scale from $15 for customer claims of $1,000 or less to $300 for customer claims over $5,000,000, correspond favorably to the $300 filing fee charged in all securities arbitration cases conducted under the auspices of the American Arbitration Association ("AAA"), a non-profit organization.

(4) *Schedule of Fees for Customer Disputes:* Section 43(a) of the Code of Arbitration Procedure currently sets forth a single schedule applicable to claims by or against public customers which specifies the amount ("hearing session deposit") subject to assessment by an arbitrator or arbitration panel as forum fees for each hearing session (defined in Section 43(b) as a meeting between the parties and an aribtrator

which lasts four hours or less). These amounts currently range, on a graduated scale, from $15 per hearing session for amounts in dispute of $1,000 or less, to $1,000 per hearing session for amounts greater than $500,000.

In addition to the proposed non-refundable filing fees previously discussed, the NASD proposes to establish in Section 43 of the Code a new schedule of hearing session deposits for customer claims, as well as a separate new schedule of hearing session deposits for industry claims against customers. In general, the proposed hearing session deposits are intended to offset costs associated with hearings, including arbitrator and staff costs and room and travel expenses.

(a) *Schedule of Fees for Claims by Customers:* The fee schedule in proposed Section 43, applicable to customer claims, sets forth in a separate column the deposit requirements in Simplified Arbitration cases brought under Section 13 of the Code. These so-called "paper" cases, which are resolved by one arbitrator without hearing based on the submission of documents by the parties and which encompass claims of no more than $10,000, pursuant to Section 13(c) currently require the submission of a deposit of $15 if the amount in controversy is $1,000 or less, $25 if the amount in controversy is more than $1,000 but does not exceed $2,500, $100 if the amount in controversy is more than $2,500 but does not exceed $5,000, or $200 if the amount in controversy is more than $5,000 but does not exceed $10,000. The proposed schedule for Simplified Arbitration cases filed by customer claimants would require a depost of $15 plus a non-refundable filing fee in equal amount for claims in which the amount in controversy is $1,000 or less; $25 plus a non-refundable filing fee in equal amount for claims involving between $1,000.01 and $2,500; $75 plus a non-refundable filing fee of $50 for claims involving between $2,500.01 and $5,000; and $75 plus a non-refundable filing fee in equal amount for claims involving between $5,000.01 and $10,000. The proposed rule change to Section 13 of the Code incorporates by reference the foregoing schedule for Simplified Arbitration claims under proposed Section 43.

The proposed schedule applicable to customer claimants has added a separate column setting forth the amount of hearing session deposit to be made when one arbitrator presides over a hearing session or a prehearing conference. A single arbitrator may preside at a prehearing conference pursuant to Section 32(d) of the Code; may preside in a case submitted under the Simplified Arbitration procedures under Section 13, where a public customer demands or consents to a hearing before a single arbitrator (Section 13(f)); and may preside in a case involving customers where the amount in controversy does not exceed $30,000, unless a party or the arbitrator requests the appointment of a panel of three arbitrators (Section 19(a)). For a hearing session in a customer claimant case before one arbitrator involving an amount in controversy of $10,000 or less, no change in the amount of hearing session deposit is proposed. The hearing session deposit for claims before a single arbitrator involving $1,000 or less will remain $15 per session; for claims above $1,000 but not exceeding $2,500, the deposit will remain $25 per session; for claims above $2,500 but not exceeding $5,000, the deposit will remain $100 per session; and for claims above $5,000 but not exceeding $10,000, the deposit will remain $200 per session. Hearing session deposits currently required in disputes concerning more than $10,000 involving customers are as follows: $400 for cases involving more than $10,000 but not exceeding $50,000; $500 for cases involving more than $50,000 but not exceeding $100,000; $750 for cases involving more than $100,000 but not exceeding $500,000; and $1,000 for cases involving more than $500,000. For matters involving more than $30,000, a proceeding before a single arbitrator encompasses only a prehearing conference. For single-arbitrator cases involving claims by or against customers of between $10,000.01 and $30,000, the proposed schedule would reduce the hearing session deposit from $400 to $300, and the proposed schedule would further reduce to $300 the hearing session deposit for all such cases involving amounts in controversy greater than $30,000. The absence of change in or reduction of the required hearing session deposit in the foregoing cases is intended to encourage the use of prehearing conferences as well as the employment in appropriate cases of single arbitrators in order to improve case administration and reduce costs to the parties.

Finally, the proposed schedule applicable to customer claimants sets forth in a separate column the amount of hearing session deposit to be made when a panel of three or more arbitrators presides over a hearing session or a prehearing conference constituting a hearing session. Under Section 19 of the Code, three or more arbitrators preside in cases involving customers where the amount in controversy exceeds $30,000 or where the matter in controversy does not involve or disclose a money claim; where the amount in controversy does not exceed $30,000, a party or the arbitrator may request the appointment of a three-person panel. In addition, under Section 13(i) of the Code, an arbitrator in a Simplified Arbitration involving an amount in controversy of $10,000 or less may request the appointment of two additional arbitrators; this latter procedure is rarely invoked, however, and it is intended that hearing session deposits in such cases will be assessed under the proposed schedule as if before a single arbitrator. Hearing session deposits currently required in disputes concerning more than $10,000 involving customers are as follows: $400 for cases involving more than $10,000 but not exceeding $50,000; $500 for cases involving more than $50,000 but not exceeding $100,000; $750 for cases involving more than $100,000 but not exceeding $500,000; and $1,000 for cases involving more than $500,000. For each hearing session in customer claimant cases before three or more arbitrators involving amounts in controversy of between $10,000.01 and $5,000,000, no change in the amount of hearing session deposit required under current Section 43 of the Code is proposed. For such cases involving claims greater than $5,000,000, the proposed schedule would increase the hearing session deposit from $1,000 to $1,500, in order to correspond more closely to the increased costs attendant to such complex cases.

(b) *Schedule of Fees for Industry Claims*: The fee schedule in proposed Section 43 applicable to industry claimants filing against public customers sets forth in a separate column the hearing deposit requirements in Simplified Arbitration cases brought under Section 13 of the Code. These so-called "paper" cases, which encompass claims of no more than $10,000, and which proceed without hearing unless the public customer demands or consents to a hearing or the arbitrator calls a hearing, pursuant to Section 13(c) currently require a deposit of $15 if the amount in controversy is $1,000 or less, $25 if the amount in controversy is more than $1,000 but does not exceed $2,500, $100 if the amount in controversy is more than $2,500 but does not exceed $5,000, or $200 if the amount in controversy is more than $5,000 but does not exceed $10,000. The proposed schedule for Simplified Arbitration cases filed by industry claimants would

require a deposit of $75 plus a non-refundable filing fee of $500 in all cases within the $10,000 limit authorized in Section 13 of the Code. The proposed rule change to Section 13 of the Code incorporates by reference the foregoing schedule for Simplified Arbitration claims under proposed Section 43.

The schedule in proposed Section 43 applicable to industry claimants also sets forth in a separate column the amount of hearing session deposit to be made when one arbitrator presides over a hearing session or a prehearing conference. As previously stated, a single arbitrator may preside at a prehearing conference pursuant to Section 32(d) of the Code, or at hearing under the circumstances set forth in Sections 13(f) or 19(a) of the Code; for matters involving more than $30,000, a proceeding before a single arbitrator encompasses only a prehearing conference. The NASD proposes that in such instances, in lieu of the varying amounts specified in the graduated schedule set forth in current Section 43(a) which range from a hearing session deposit of $15 for disputes involving $1,000 or less to $1,000 for disputes involving more than $500,000, that a hearing session deposit in the amount of $300 be required of industry claimants for each hearing session in which a single arbitrator presides, notwithstanding the amount in controversy.

Finally, the proposed schedule applicable to industry claimants set forth in a separate column the amount of hearing session deposit to be made when a panel of three or more arbitrators presides over a hearing session or a prehearing conference constituting a hearing session. As previously stated, three or more arbitrators may preside in cases involving customers under circumstances set forth in Section 19(a) and (b) of the Code. In addition, as discussed above, an arbitrator may request the appointment of a three-person panel under Section 13(i) of the Code, a procedure which is rarely invoked, and in which circumstance it is intended that hearing session deposit be assessed under the proposed schedule as if before a single arbitrator. For single hearing sessions in industry claimant cases before three or more arbitrators involving amounts in controversy of between $10,000.01 and $50,000, the proposed schedule would increase the hearing session deposits from $400 to $600; for such cases involving amounts in controversy of between $50,000.01 and $100,000, the proposed schedule would increase the hearing session deposit from $500 to $600; and for such cases involving amounts in controversy of between $100,000.01 and $500,000, the proposed schedule would not change the hearing session deposit currently required of $750. For such cases involving amounts in controversy of between $500,000.01 and $5,000,000, the proposed schedule would also maintain the hearing deposit currently required of $1,000. The proposed schedule would establish a new category for such cases in which the amount in controversy is greater than $5,000,000, for which a hearing deposit of $1,500 per session would be required.

(5) *Schedule of Fees for Industry and Clearing Controversies*: Section 8 of the Code of Abritration Procedure mandates that disputes between or among members, associated persons and certain other industry participants be resolved on demand of a party through arbitration under the Code. Section 45(a) of the Code currently sets forth a schedule applicable to such claims between industry participants which specifies the amount ("hearing session deposit") to be made available for assessment by an arbitrator or arbitration panel as forum fees for hearing session (defined in Section 45(b) as a meeting between the parties and an arbitrator which lists four hours or less). Section 45(a) currently requires the submission of a deposit per hearing session of $200 if the amount in controversy is $10,000 or less, $750 if the amount in controversy is more than $10,000 but less than $100,000, or $1,000 if the amount in controversy is more than $100,000.

The schedule of fees applicable to claims between industry participants in proposed Section 44 for Simplified Industry Arbitration "paper" cases under Section 10 of the Code, proceedings before one arbitrator, and proceedings before three or more arbitrators is identical to the schedule of fees of industry claims in proposed Schedule 43 discussed in Section (3)(b) above, and is intended to be administered in the same manner. While not at this time a rule change endorsed or proposed by SICA, the schedule of fees for industry claims in proposed Section 44 was favorably recommended by the NASD National Arbitration Committee and was authorized for filing with the Commission by the Board of Governors on November 17, 1989, in order to improve the fiscal year administration of the arbitration facility provided by the NASD.

(6) *Assessments in Consolidated Cases*: Currently, the Code of Arbitration Procedure does not provide explicit guidance as to how costs in consolidated cases are to be assessed. Proposed new Sections 43(d) and 44(d) provide that the hearing deposit and forum fees assessable per hearing session after joinder or consolidation shall be based on the cumulative amount claimed by the joined or consolidated parties. The arbitrators retain authority to determine by whom such fees shall ultimately be borne.

(7) *Increase in Deposit for Claims of Unspecified Amounts:* Under current provisions of the Code of Arbitration Procedure, parties filing claims in both customer and industry disputes which do not disclose the specific monetary amount in controversy or the exact amount sought to be awarded must deposit $200 or such amount as the Director of Arbitration or the panel of arbitrators may require, in an amount which may not exceed $1,000. In some cases, parties have attempted to frame unspecified claims and have argued that the required deposit for their case should be only $200, notwithstanding the actual amount in controversy. Proposed Section 43(e), upon which proposed Section 44(e) is based, was developed by SICA. Believing that particularity and specificity in claims should be encouraged for the sake of fundamental fairness and for the sake of efficient case administration, the Association has determined, in proposed new Sections 43(e) and 44(e) of the Code, to require a non-refundable filing fee of $250 and a hearing session deposit of $600 or such greater or lesser amount as the Director of Arbitration or the panel of arbitrators may require, not exceeding $1,000, in cases where no monetary damages are alleged or the amount in controversy is not specified.

(8) *Increase in Administrative Fee Retained in Cases Settled or Withdrawn Before Hearing:* Under current provisions of the Code, an administrative fee of $100 in customer cases or $125 in industry cases is retained if a case is settled or withdrawn prior to the commencement of the first hearing session, and the balance of the filing fee is returned. If a customer case utilizing the simplified arbitration procedures under the Code is settled or withdrawn within the same time frame, the entire filing fee is currently returned.

The NASD has determined that in a sample of cases spanning the entire docket for April and May 1988, 266 docketed arbitration cases were closed by withdrawal or settlement. Of these, 165 or 62 percent settled or were withdrawn after the parties were advised that a panel had been selected,

and deposits were returned to the parties although substantial time and effort had been expended to process the claims, schedule the cases for hearing, appoint arbitrators, and resolve pre-hearing issues.

Proposed Section 43(f), upon which proposed Section 44(f) is based, was developed by SICA. The Association has thus determined, in proposed Sections 43(f) and 44(f) of the Code, to provide, in addition to retention of all non-refundable fees, for the retention of the total initial amount deposited as hearing session deposits by all the parties if a case, including a case filed under customer simplified procedures, is settled or withdrawn within eight business days of the first scheduled hearing session. A prehearing conference with an arbitrator is not considered a scheduled hearing session under the proposed sections.

The Association believes that the fees and the methods for their assessment referenced in the foregoing sections are consistent with Section 15A(b)(5) of the Act, which requires that the rules of the Association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the Association operates or controls.[1]

Amount of claim or counterclaim	Fee
$1 to $25,000	3% ($300 minimum).
$25,000 to $50,000	$750, plus 2% or excess over $25,000.
$50,000 to $100,000	$1,250, plus 1% of excess over $50,000.
$100,000 to $200,000	$1,750, plus ½% of excess over $100,000.
$200,000 to $5,000,000	$2,250, plus ¼% of excess over $200,000.
$5,000,000 to $50,000,000	$14,250, plus 1/10% of excess over $5,000,000.

[1] The NASD notes that the foregoing fees take into consideration the fact that in addition to other fixed and variable administrative costs, the NASD, in order to reflect its appreciation toward the volunteers serving as its arbitrators, pays an honorarium of $75 for each case not requiring a hearing; an honorarium of $150 for a single session of up to four hours; and $225 for a double session of up to eight hours, plus a $50 per day additional honorarium for the chairperson of a panel.

The NASD believes that the schedules of fees set forth in proposed Sections 43 and 44 compare favorably with the fee schedule employed in securities arbitration cases conducted under the auspices of the AAA. In addition to a non-refundable filing fee in each case of $300, discussed above in reference to the proposed establishment of non-refundable filing fees in proposed Sections 43 and 44, the AAA generally requires an additional payment, which is not related to the number of hearing sessions required in a case, based on the amount of each claim or counterclaim disclosed in a party's filing in accordance with the following AAA schedule:

B. Self-Regulatory Organization's Statement on Burden on Competition

The Association does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Securities Exchange Act of 1934, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Association has neither solicited nor received comments on the proposed rule changes.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commissioner may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By Order Approve Such Proposed Rule Change, or

B. Institute Proceeding to Determine Whether the Proposed Rule Change Should be Disapproved.

Specifically, the NASD proposes to make the proposed rule changes effective immediately upon Commission approval.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference room.

Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by May 11, 1990.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Dated: April 12, 1990.

Jonathan G. Katz,

Secretary.

[FR Doc. 90-9165 Filed 4-19-90; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-27906; File No. SR-NASD-90-1B]

Self-Regulatory Organizations; Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Criteria for Inclusion of Securities in the NASDAQ System

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on March 28, 1990 and April 9, 1990 the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change and an amendment thereto, as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change as amended from interested persons.

I. Self-Regulatory Organizations Statement of the Terms of Substance of the Proposed Rule Change

The proposed change imposes more stringent criteria for initial and continued inclusion of securities in the NASDAQ system. The text of the proposed rule change to be contained in Schedule D of the NASD By-Laws, Part II, Sections 1 and 2, is as follows: (Bracketed material indicates deletions; italicized material indicates additions):

Qualification Requirements for NASDAQ Securities

Sec. 1. Qualification Requirements for Domestic and Canadian Securities

To qualify for inclusion in the NASDAQ System, a security *of a domestic or Canadian issuer* shall satisfy all applicable requirements contained in subsections (a) or (b), and (c) herein.

(a) No change.

(b) No change.

(c) In addition to the requirements contained in the subsections (a) or (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for inclusion in the NASDAQ System:

(1) For initial *and continued* inclusion, the issue shall have two registered and active market makers, one of which may be a market maker entering a stabilizing bid. [For continued inclusion, the issue shall have one registered and active market maker.]

(2) For initial inclusion, the issuer shall have total assets of at least [$2] *$4 million.* For continued inclusion, the issuer shall have total assets of at least [$750,000] *$2 million.* An issuer's total assets will be determined on the basis of a balance sheet prepared in accordance with generally accepted accounting principles. Assets that are temporary or restricted in their use will be excluded from the determination of total assets.

(3) For initial inclusion, the issuer shall have capital and surplus of at least [$1] *$2 million.* For continued inclusion, the issuer shall have capital and surplus of at least [$375,000] *$1 million.* Only issues of common and preferred stock will be included in capital and surplus. Debentures and redeemable securities with the redemption provision within the sole control of the holder will be excluded from the determination of capital and surplus.

(4) *For initial inclusion common or preferred stock shall have a minimum bid price of $3 per share. For continued inclusion the minimum bid price per share shall be $1.*

(5) In the case of common stock, there shall be at least 300 holders of the security. An account of a member that is beneficially owned by a customer (as defined in Article II, Section 1(f) of the NASD Rules of Fair Practice) will be considered a holder of a security upon appropriate verification by the member.

(6) In the case of common stock, there shall be at least 100,000 publicly held shares. *For initial inclusion such shares shall have a market value of at least $1 million. For continued inclusion such shares shall have a market value of at least $200,000.* Shares held directly or indirectly by any officer or director of the issuer and by any person who is the beneficial owner of more than 10 percent of the total shares outstanding are not considered to be publicly held.

(7) A failure to meet the continued inclusion requirements for number of market makers, market value of public float and minimum bid price per share shall be determined to exist only if the deficiency for the applicable criterion continues for a period of 10 consecutive business days. Upon such failure, the issuer shall be notified promptly and shall have a period of 90 calendar days from such notification to achieve compliance with the applicable initial inclusion standard.

[7]*(8)*(a) In the case of rights and warrants, for initial inclusion only, there shall be at least 100,000 issued and the underlying security shall be included in the NASDAQ System or listed on a national securities exchange.

(b) In the case of put warrants (that is, instruments that grant the holder the right to sell to the issuing company a specified number of shares of the Company's common stock, at a specified price until a specified period of time), for initial inclusion only, there shall be at least 100,000 issued and the underlying security shall be included in the NASDAQ System or listed on a national securities exchange.

[8]*(9)* In the case of units, all components parts shall meet the requirements for initial and continued inclusion.

Subsections (9)–(14) are renumbered (10)–(15) respectively.

Sec. 2. Qualification Requirement for *non-Canadian* Foreign Securities and American Depository Receipts

To qualify for inclusion in the NASDAQ System, a security of a *non-Canadian* foreign issuer, an American Depositary Receipt ("ADR") or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b), (c), and (d) and (e) herein.

(a)–(d) No change.

(e) In addition to the requirements contained in subsections (a), (b), or (c) and (d), the security shall satisfy the following criteria for inclusion in the NASDAQ System.

(1) For initial *and continued* inclusion, the issue shall have two registered and active market makers. [For continued inclusion, the issue shall have one registered and active market makers.] *A failure to meet the continued inclusion requirement for number of market makers shall be determined to exist only if the deficiency continues for a period of 10 consecutive days. Upon such failure the user shall be notified promptly and shall have a period of 90 calendar days from such notification to achieve compliance with the market maker requirement.*

(2) For initial inclusion, the issuer shall have total assets of at least U.S. [$2 million.] *$4 million.* For continued inclusion, the issuer shall have total assets of at least U.S. [$750,000] *$2 million.* An issuer's total assets will be determined on the basis of a balance sheet prepared in accordance with U.S. generally accepted accounting principles or those accompanied by detailed schedules quantifying the differences between U.S. generally accepted accounting principles and those of the issuer's country of domicile. Assets that are temporary or restricted in their use will be excluded from the determination of total assets.

(3) For initial inclusion, the issuer shall have capital and surplus of at least U.S. [$1 million.] *$2 million.* For continued inclusion, the issuer shall have capital and surplus of at least U.S. [$375,000.] *$1 million.* Only issues of common, preferred or equivalent stock will be included in capital and surplus. Debentures and redeemable securities with the redemption provision within the sole control of the holder will be excluded from the determination of capital surplus.

(4)–(15) No. change.

II. Self-Regulatory Organizations Statement of the Purpose of and Statutory Basis for, the Proposed Rule Change.

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The proposed rule change was adopted pursuant to Article VII, Section 1(a)(6) of the NASD By-Laws and would increase the requirements for initial inclusion in the NASDAQ System to $4 million in total assets and $2 million in total capital and surplus, require $1,000,000 in market value of public float and a minimum bid price of $3 share. Other initial inclusion standards would be retained without change. The rule change would also increase the NASDAQ maintenance requirements to $2,000,000 in total assets, and $1,000,000 in capital and surplus and would require 2 market makers, $200,000 in market value of public float and a minimum bid price of $1 share. The proposed rule change would treat U.S. and Canadian issuers in an equal manner but would exempt non-Canadian foreign issues and American Depository Receipts from the price per share and the related market

value of public float requirements. The NASD believes that treating Canadian and domestic issues alike is appropriate and consistent with positions taken by the Commission in the past. (See Exchange Act Release 20624, October 6, 1983). In that release, the Commission adopted certain revisions to Commission rule 12g3–2. In adopting provisions requiring Section 12 registration for foreign issuers, the Commission had been asked to "grandfather" both Canadian and non-Canadian foreign issuers. The Commission opted, however, to distinguish between Canadian and non-Canadian issuers stating that "the adopted revision is consistent with the Commission's position of treating Canadian issues the same as U.S. issues for many purposes." 48 FR 46737 (Oct. 14, 1983). Further, the NASD believes that trading characteristics of non-Canadian foreign issuers warrant an exclusion, at this time, from the price per share and related market value of float requirements.

These increases in the initial and maintenance criteria are being made to take into account the effects of inflation since the requirements were last amended in 1981, and to take into consideration concerns raised by the Commission after its adoption of Exchange Act Rule 16c2–6. The increase in the maintenance requirements will be delayed until January 1, 1991 to allow issuers additional time to comply with the increased standards and is contingent upon the NASD operated OTC Bulletin Board Service being in operation.

The NASD's consideration of these changes was also prompted by the receipt of a letter dated January 10, 1990, relating to Exchange Act Rule 15c2–6, which became effective on January 1, 1990. In that letter, the Commission's Division of Market Regulation expressed concerns that certain promoters might attempt to circumvent the requirements of the Rule by seeking NASDAQ authorization.

In response to the effectiveness of Rule 15c2–6 and to the Division's letter, various proposals for modification of the NASDAQ inclusion and maintenance criteria were considered by a number of NASD Committees [1] and by the Board of Governors at its March 1990 meeting. The Board determined at this meeting, consistent with the intent of the Division's January 10th letter and the effects of inflation since 1981, that it would be consistent with the public interest and the protection of investors to amend Schedule D of the By-Laws to increase the initial and continued inclusion criteria for issues on the NASDAQ System.

The NASD will make the proposed rule changes to the initial inclusion criteria effective and applicable to all issuers upon Commission approval. On February 15, 1990, the NASD filed with the Commission File No. SR–NASD–90–8 which proposed certain interim changes to the NASDAQ initial inclusion standards. In that filing, the NASD expressed its intent that issuers which made application and were authorized for NASDAQ inclusion on or after February 15, 1990 but prior to the approval of the interim standards by the Commission be required to demonstrate compliance with the interim standards within 90 days of Commission approval of those standards or be subject to removal from the NASDAQ system. The NASD has determined to withdraw File No. SR–NASD–90–8 [2] and to incorporate herein its provisions regarding the dates for the effectiveness of the new requirements. The proposed initial inclusion requirements will, therefore, be applicable to issuers having made application on or after February 15, 1990, ninety (90) days after the Commission's approval of this filing. In those instances in which the criteria contained in the present filing differ from those in File No. SR–NASD–90–8 (i.e., number of market makers, number of publicly held shares and market value of publicly held shares), issuers having made application on or after February 15, 1990 will be required to meet the initial inclusion criteria contained in the present filing within ninety (90) days of Commission approval.

Applications for NASDAQ inclusion filed prior to February 15, 1990 shall be deemed to have been withdrawn and a new application will be required if the issuer has not entered the NASDAQ System within ninety (90) days of Commission approval of this filing.

The proposed changes to the continued inclusion criteria (maintenance criteria) will be made effective January 1, 1991 contingent upon the NASD operated OTC Bulletin Board Service being operational at that time.

The NASD believes that the proposed rule changes are consistent with the provisions of Sections 15A(b)(6) and 15A(b)(11) of the Act in that they will further the purposes of the Commission in adopting Rule 15c2–6 and will act to protect investors and the public interest by ensuring that quotations are designed to produce fair and informative quotations, to prevent fictitious or misleading quotations and to promote orderly procedures for collecting, distributing and publishing quotations. The NASD believes that the standards being proposed reflect levels of issuer size and investor interest consistent with inclusion in a nationwide securities market such as NASDAQ.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change may result in certain NASDAQ companies being deleted from the System. In addition, certain issuers which would qualify under the existing inclusion requirements may not qualify under the proposed inclusion requirements. The proposed rule change may, therefore, have an adverse impact upon those issuers. The NASD believes, however, that the benefit to the investing public to be derived from the increased standards substantially outweighs any such detriment.

Further, the NASD has addressed this issue in several ways. First, the NASD intends to delay the effectiveness of the increased continued inclusion criteria until January 1, 1991 to allow existing NASDAQ issuers a reasonable period of time to take appropriate action to remedy any deficiencies which may exist. In addition, the NASD is providing an alternative trading medium for companies which will not be eligible for NASDAQ inclusion or which may be deleted from NASDAQ, through its proposed OTC Bulletin Board Service which will provide a viable market for issuers having securities that are not included in the NASDAQ system. The "Bulletin Board" which is the subject of filing SR–NASD–88–19 [3] will operate on

[1] The Committees which considered the question of inclusion standards were the Corporate Advisory Board, the NASDAQ Hearing Review Committee, and the Trading Committee. These committees proposed to the Board of Governors similar, but not identical, standards for initial and continued inclusion.

[2] *See* Securities Exchange Act Release No. 27731 (February 23, 1990); 55 FR 7615 (March 2, 1990). The NASD withdrew SR–NASD–90–8 on April 11, 1990. *See* letter from T. Grant Callery, Vice President and Deputy General Counsel, NASD, to Katherine England, Branch Chief, Branch of OTC Regulation, Division of Market Regulation, Commission, dated April 11, 1990. As of this date, the Commission has received 48 comment letters in response to publication of SR–NASD–90–8. Those comment letters will be reviewed in connection with the present filing (SR–NASD–90–18), in so far as relevent. Commentators to SR–NASD–90–8 are encouraged to supplement their earlier comments, if necessary.

[3] *See* Securities Exchange Act Release No. 25949 (July 28, 1988), 53 FR 29092, requesting comment on the NASD's proposed Bulletin Board.

a real-time basis allowing member firms, for the first time, to enter, update and view quotation information on OTC securities which are not included in the NASDAQ system. As previously indicated, the effectiveness of the proposed new maintenance standards is predicated upon implementation of the Bulletin Board.

Finally, the procedures for obtaining exceptions to the qualification requirements pursuant to Part II, Section 3 of Schedule D, the procedural safeguards provided pursuant to Article IX of the NASD Code of Procedure and review of such determinations by the Commission will continue to be available to the affected issuers.

The NASD has also considered the effect these proposed changes will have on the capital formation process. It is unquestioned that inclusion in the NASDAQ system aids in the capital process. However, this should not impede the ability of the NASD to impose meaningful standards for the inclusion and continued inclusion of securities in a credible marketplace. Such credibility is most important to the capital formation process and the proposed increased standards will have the effect of further enhancing such credibility. In addition, there are currently in excess of 10,000 securities which are publicly traded and regularly quoted outside of the NASDAQ and exchange markets which have, at some point accessed the public capital markets without seeking inclusion in NASDAQ or an exchange. In its discussions of this issue the NASD Board noted that traditional sources for financing of small companies have included among others, private placements, venture capital investments and offerings under Regulation A all of which are still available. There is no reason to believe that such access to capital will not continue, and even be enhanced, once the increased visibility of the Bulletin Board becomes available.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing For Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the NASD consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by May 11, 1990.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Dated: April 13, 1990.

Jonathan G. Katz,

Secretary.

[FR Doc. 90-9166 Filed 4-19-90; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-27901; File No. SR-GSCC-89-13]

Self-Regulatory Organizations; Order Approving, on a Temporary Basis, a Proposed Rule Change by the Government Securities Clearing Corporation Relating to Modifications to its Clearing Fund Formula

April 12, 1990.

I. Introduction and Summary

On December 1, 1989, the Government Securities Clearing Corporation ("GSCC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR-GSCC-89-13) under section 19(b)(1) of the Securities Exchange Act of 1934, as amended ("Act"). (1) The proposed rule change revises GSCC's clearing fund formula. Notice of the proposal appeared in the **Federal Register** on January 10, 1990. (2) On December 13, 1989, and February 5, 1990, GSCC amended the proposed rule change, among other things, to include margin factors in the clearing fund formula for certain United States agency and multinational development bank securities. (3) Notice of the proposed amendment appeared in the **Federal Register** on March 1, 1990. (4) On March 16, 1990, GSCC amended the proposal to authorize GSCC to require members to satisfy clearing fund deposit deficiencies on a same-day basis. (5) The Commission did not receive any comments regarding the proposed rule filing. For the reasons discussed below, the Commission is approving the proposed rule change, as amended until April 30, 1992.

II. Description

A. Proposed Changes to the Clearing Fund Formula

The proposal would revise the clearing fund formula, (6) as applied to securities net settlement obligations, (7) in order to reflect more accurately GSCC's potential liquidation and default risks associated with member obligations to deliver or receive securities. In particular, the proposal would reduce member clearing fund contribution requirements (8) by allowing partial offsets (9) in required margins among long and short positions (10) in securities and classes of securities that exhibit historical price relationships. (11)

The proposal effects substantial changes to the second component of GSCC's clearing fund formula ("securities net-settlement component") by amending Rules 1 and 4 of GSCC's Rules and Procedures. (12) That formula's securities net-settlement component is designed, in effect, to collateralize GSCC's guarantee of a member's securities deliver and receive obligations. (13) The proposal would also make all aspects of the revised clearing fund formula applicable to net settlement positions in securities, as that term is defined in sections 3(a)(42)(A), (B) and (C) of the Act, (14) which are currently eligible for comparison through GSCC. (15).

Under the revised clearing fund formula, a member's securities net settlement contribution requirement would be the greater of either the average offset margin amount for the last 20 business days or 50% of the gross margin amount. The gross margin amount is the product of the appropriate margin factor (16) multipled by the total dollar value of the member's net

settlement position that day. (17) The offset margin amount is calculated by subtracting a credit for offsetting net settlement positions (18) from the gross margin amount of the member's net settlement positions.

1. Offset Classes

GSCC will establish "offset classes" for securities based on dates to maturity and "disallowance percentages" among those different classes of securities. (19) Offset classes are groupings of securities that historically display market price correlation sufficient to justify offsetting clearing fund formula credits and debits. "Disallowance percentages" are the percentages by which GSCC will reduce credits for offsetting positions to protect against the risk that the market price correlation among securities may be imperfect or may deviate from historical norms. Offset classes and disallowance percentages will be established and monitored on the basis of reports showing the statistical correlation among groups of securities.

GSCC will measure the degree of correlation between the price variation of securities (*i.e.*, the extent to which the increased value of a given security tends to be associated with the increased value of another, while the decreased value of the same security tends to be associated with a decreased value of the other). For this purpose, GSCC will group securities into classes according to the remaining time to maturity (*see* Table I). (20)

TABLE I—OFFSET CLASS SCHEDULE

Time to maturity	Offset class
1 day through 3 months	A
3 months plus 1 day through 6 months	A
6 months plus 1 day through 1 year	B
1 year plus 1 day through 2 years	C
2 years plus 1 day through 4 years	D
4 years plus 1 day through 7 years	
5 years plus 1 day through 7 years	E
7 years plus 1 day through 10 years	F
10 years plus 1 day through 15 years	F
15 years plus 1 day or greater	G

GSCC will measure the coefficient of correlation between each security in a class with each security in the other classes by applying the following formula to the price variations of two securities, "x" and "y:" (21)

$$r=\sigma xy/\sigma x\cdot\sigma y$$

The value of "r" will always be between −1 and +1. The closer "r" becomes to −1 or +1, the stronger the degree of correlation between the price of one security and the price of another security. A value of "r" near or equal to zero means that the correlation is very weak. Under the proposal, if the coefficient of correlation is very weak. Under the proposal, if the coefficient of correlation is less than zero (*i.e.*, has a negative value), GSCC will assign it a value of zero. (22)

GSCC will square each coefficient of correlation in order to determine the coefficient of determination. (23) GSCC will then average the coefficients of determination between the securities of one class and the securities of another class, weighing each coefficient appropriately for the level of trading activity in each security. GSCC will then subtract the resulting average from 1 in order to determine the disallowance percentage for that class. (24) Table II sets forth GSCC's proposed disallowance percentage schedule for treasury securities.

TABLE II

Offset Class	A	B	C	D	E	F	G
A	0	30	40	100	100	100	100
B	30	0	20	30	100	100	100
C	40	20	0	20	30	40	100
D	100	30	20	0	20	30	40
E	100	100	30	20	0	20	30
F	100	100	40	30	20	0	20
G	100	100	100	40	30	20	0

2. Application of the Percentage of Disallowance and the Revised Clearing Fund Formula

As previously stated, the second element of the proposed formula will be the greater of either 50% of the participant's total gross margin amount or the average offset margin amount. (25) In order to determine the average offset margin amount, GSCC will establish the offset margin amount by first calculating the gross margin amount for each position. GSCC will compare the gross margin amount for each security and use the lower one, thus allowing an offset for the same quantity of gross margin account in both securities. The lower gross margin amount will be added to the other security's equivalent gross margin amount. GSCC will then multiply the sum of these amounts by the difference between 1 and the disallowance percentage. The resulting product is the credit for the offsetting net settlement positions, which is subtracted from the participant's total gross margin amount in order to calculate the offset margin amount.

For the purposes of the clearing fund formula, GSCC will calculate the average offset margin amount over the previous 20 business days. Pursuant to the proposal, GSCC will be able to place greater weight on more recent days within the 20 business days. (26) GSCC will use this average as the second element of the formula if it is greater than 50% of the participant's gross margin amount. (27)

B. Proposed Enhancements to GSCC's Ability to Collect Additional Fund Deposits

The proposal would authorize GSCC to collect, on a same-day basis, additional clearing fund contributions from certain members, even if those members are not subject to closer than normal surveillance. As revised, GSCC Rule 4, section 9 would authorize GSCC to collect, on a same-day basis, (28) the difference between a member's "required fund deposit" and the member's actual deposit, if the difference exceeds $250,000 or 25% of the member's actual deposit. For purposes of GSCC Rule 4, Section 9, a member's "required fund deposit" would be calculated under the clearing fund formula, but instead of using the average offset margin amount (*e.g.*, the 20-day average component), GSCC would use the offset margin amount for that particular day. Thus, GSCC would calculate it's potential exposure from the member's settling trades for that particular day (giving credit for offsetting class positions) and determine whether an additional deposit is necessary.

The proposal also would authorize GSCC to collect from participants subject to closer than normal surveillance the difference between the "required fund deposit" plus any additional amounts required pursuant to GSCC's Rule 4 section 3, (29) and the total participant's deposit to the clearing fund, within three business days. Likewise, GSCC would be able to collect such difference, within three business days, from members under closer than normal surveillance if their clearing fund deposit is equal to 90% or less of the "required fund deposit."

C. Assessment of Price Volatility in the Government Securities Market

GSCC has developed an automated system for assessing market price volatility to enable it to both determine the accuracy of margin intervals and allow for credits for offsetting net settlement positions. As a first step, GSCC is implementing an automated system to monitor unusual price variations. The System also will allow GSCC to ascertain a system price for each eligible netting security. According to GSCC, each business day, the system will capture the following pricing data for each eligible netting security with a separate CUSIP number:

(a) The par weighted average price of all compared trades in that security and of all compared trades that went into net;

(b) The high and low trade prices for compared trades and for netted trades;

(c) The closing price as determined by GSCC using timed trade information received from members;

(d) The closing price as reported by the inter-dealer broker netting members and any other third party sources (*e.g.*, a Federal Reserve Bank or private financial services). (30) GSCC will review and group this pricing information, excluding prices that do not reflect inter-dealer prices for the security. (31)

1. Price Monitoring and Determination of a System Price

On a daily basis, GSCC will generate an "Administrative Price Monitoring Report" in order to monitor price variations as well as unusual trade prices. The report will list all compared trades and prices falling outside certain parameters. These parameters, based on the size of a trade, are three standard deviations for "small" trades and two standard deviations for "large" trades. (32) In the event there is an insufficient number of trades in a particular CUSIP to establish a meaningful standard deviation parameter, the system averages all available compared prices and establishes an alternate parameter using a percentage of the par-weighted average of all compared trades. (33)

The system also will allow GSCC to calculate, on a daily basis, a system price that is as close as possible to the closing inter-dealer price. For this purpose, GSCC will calculate the average price for all trades compared for netting, weighing each trade according to its relative size. If, however, as a result of special market conditions this average is distorted, GSCC, based on collected data, will choose, instead, a price as close as possible to the inter-dealer closing price. (34)

GSCC will use system price data to create a historical file of at least one year in order to determine measures of volatility on a short-term basis (*e.g.*, previous 20 business days), a long-term basis (*e.g.*, the past year) and an intra-day basis. This system will calculate the volatility of each security with a different CUSIP number on the basis of standard deviations derived from these measurements. This calculation will reflect the maximum daily change in system price over the specified time period. GSCC will employ these measurements to determine the average volatility for each security by CUSIP based on all CUSIPs for products that fall within a maturity range, weighing each change appropriately for its relative dollar value.

2. Margin Factor Assessment

The historical file will allow GSCC to determine whether the established margin factors are appropriate. The system will calculate the margin factor for each eligible netting security by doubling the greater of either the short-term or the long-term standard deviation. (35) This calculation will ensure that 95% of all price movements will fall within the margin interval set by GSCC.

GSCC's proposal will account for abnormal distributions resulting from extremely large price fluctuations. Where a relatively small percentage of the total number of trades are at or near the mean price, and the value of one standard deviation for a security is over or under the mean price of the security by more than an acceptable amount, the system will establish a percentage deviation from the mean price in order to ensure that the margin interval will cover, at least, 95% of all collected price changes. (36)

Each night GSCC's system will compare the clearing fund margin factors with the average volatility on a product and maturity basis for both the long-term and the short-term outlook. This will permit GSCC to adjust its margin factors, in consultation with the GSCC Board of Directors and the Membership and Standards Committee.

III. GSCC's Rationale

GSCC believes that the current calculation of clearing fund contributions may overstate the exposure to GSCC stemming from a member's settlement activity. According to GSCC, the proposed rule changes will allow it to consider offsets within such member's net settlement obligations while enabling it to collect an appropriate level of clearing fund contributions. GSCC, believes that, as such, the proposal will promote the prompt and accurate clearance and settlement of transactions for which GSCC is responsible, and, therefore, is consistent with section 17A of the Act. (37)

IV. Discussion

In the Release announcing standards for the registration of clearing agencies, the Division of Market Regulation counseled clearing agencies to "establish by rule an appropriate level of clearing fund contribution based, among other things, on its assessment of the risks to which it is subject." (38) GSCC's current clearing fund formula "serve[s] as a mechanism for GSCC to measure the risk profile of its members' securities settlement obligations for yesterday's trades, standing alone, and against the backdrop of a member's settlement obligations for the previous month." (39)

The current formula, moreover, assesses the level of risk on the basis of "gross" net settlement positions, without consideration for offsets. As a result, clearing fund requirements on hedged positions are set at a comparatively higher level than straight purchases or sales, failing to take the lower risk into account. While GSCC's current clearing fund requirements offer an increased protection for GSCC, the higher cost of maintaining the required contribution level could result in reduced liquidity for participants.

Fund contribution requirements should be set at an adequate level of protection in light of current market conditions, such as unusual volatility, while taking into account the overall risk on an entire position. For this reason, the Commission must determine whether the proposed changes to the clearing formula will strike "a suitable balance between controlling financial exposure * * * and imposing excessive business costs on * * *" GSCC's membership. (40) GSCC proposes to

achieve this balance by making two revisions to its clearing fund formula. The first revision will allow GSCC to monitor the effectiveness of its margin factors while the second proposal will allow GSCC to give credits for offsetting net settlement positions. In addition, as a safeguard, GSCC is enhancing its ability to require additional fund deposits from its participants. (41)

The proposed revisions to the clearing fund formula are being implemented in conjunction with an automated system that will allow GSCC to monitor the manner in which price volatility in the Government securities market affects the margin factor and offsetting components of the clearing fund formula. The Commission believes that this automated system is a more reliable method of risk measurement that will protect GSCC in the event of uncharacteristic volatility. As such, the Commission believes the system is designed to assist GSCC in avoiding over-margining or under-margining that could result from flat percentage-based margin requirements. For this reason, the Commission also believes that GSCC's proposal is consistent with the provisions of section 17A of the Act and, in particular, with the statutory requirement to have the capacity "to safeguard securities and funds in its custody or control or for which it is responsible." (42)

A. Monitoring Margin Factors

1. Determination of System Price

When GSCC's netting system was approved, the Commission found GSCC's proposed schedule of margin factors "satisfactory for the start-up of netting * * *." (43) The Commission noted, however, that GSCC needed to develop an automated system to assess, on a daily basis, historical and potential price movements and their implications for margin factors. (44) GSCC has now developed such a system and is proposing to employ it as a way of monitoring the adequacy of the established margin factors. The first step in this process requires GSCC to ascertain the system price for each eligible netting security in order to be able to calculate the desired measures of volatility in these securities. Currently, however, there is no standard method to determine an accurate closing price for Government securities, because transactions involving these securities are not time-stamped and dealers and brokers do not report their closing prices. (45) GSCC, therefore, will calculate a weighted average of trades compared for netting, in order to determine the system price for each eligible netting security.

In reviewing GSCC's netting system, the Commission expressed its concern that this manner of calculating a system price may not accurately reflect the inter-dealer closing price on days when there has been substantial intra-day price volatility. (46) In order to prevent such distortions, GSCC will continue to collect information from several sources and will compare this information with the system price. (47) In addition, the system will offer GSCC the capability of screening trades that reflect prices other than inter-dealer prices. If after comparing the system price with the collected price information, GSCC determines that this price does not reflect the inter-dealer closing price, it will choose a price closer to the closing price among Government securities dealers.

This discretionary procedure could limit the effectiveness of GSCC's pricing system insofar as it subjects the final determination of a system price to potential human error. At the same time, however, GSCC's ability to select a price other than the system price gives it an added flexibility to reconsider the pricing process and, if necessary, a last chance to adjust it to market conditions. Moreover, GSCC continues to develop the system in order to reduce its reliance on the discretionary determination of a system price during periods of high volatility, while preserving the added flexibility necessary under unusual market conditions. Currently, for example, GSCC is producing a systemic model yield curve that will alert GSCC whenever a weighted average is substantially different from the expected inter-dealer closing price.

GSCC's proposed pricing procedure will allow an enhanced control of the credit and liquidity exposure arising from the substitution of GSCC as the contra-party to all open netted positions. In particular, the proposed pricing system will allow GSCC to calculate more accurately any exposure if it is required to hold securities overnight. (48) Likewise, the system will provide GSCC with more reliable information in order to calculate the value of failed net settlement positions (49) and, if necessary, the corresponding marks-to-the-market for such positions. (50) This calculation is particularly important because GSCC is required to pay the value of marks-to-the-market as part of its funds-only settlement obligations, regardless of whether it collects payments owing from any other member. (51) In light of this required payment obligation, the Commission believes that the proposed pricing system will add to GSCC's capacity to safeguard securities and funds in its custody or control or for which it is responsible. (52)

2. Margin Factor Assessment

GSCC has established a margin factor for each maturity range within each product group. The Commission understands that, by their very nature, margin intervals must be set within an environment of imperfect knowledge regarding the future course of volatility. Nonetheless, narrow margin intervals could expose GSCC to significant exposure if prices rise or fall beyond the chosen parameters while very broad margin intervals could increase substantially margin requirements for GSCC members without significant corresponding safeguarding benefits.

GSCC's proposed assessment of the adequacy of its margin factors is designed to capture 95% of a particular security's historical one-day market price variations. In order to determine whether the established margin factors are appropriate, GSCC will use system price data to create a short-term (*e.g.*, previous 20 business days) and a long-term (*e.g.*, the past year) historical file. Maintaining price change data for both periods will provide important protection in setting suitable margin intervals. While constant monitoring of short-term price changes should reliably detect recent price volatility, it could result in under-margining for products that have recently experienced unusual low volatility. On the other hand, reliance solely on long-term volatility data might not give recent rapid price changes the proper weight in margin interval determinations. For this reason, GSCC has determined, and the Commission concurs, that it is prudent to examine short-term and long-term volatility data and to calculate margin intervals based on the period demonstrating the greatest range of price volatility. Moreover, in instances where a two standard deviation interval does not provide protection for at least 95% of the observed price changes, GSCC will adjust the margin interval to encompass, at least, 95% of the observed price changes.

Given the relative stability of the Government securities market, the Commission believes that a margin interval encompassing at least 95% of the observed price changes is appropriate for the initial two year pilot period. The Commission is concerned, however, that GSCC's standard deviation analysis may not fully reflect a sudden price fluctuation such as the

one endured by the Government securities market in 1987. (53) While GSCC intends to adjust margin intervals to protect against non-normal distributions, the Commission expects GSCC to monitor the adequacy of its new system (54) and to make adjustments as necessary, on a regular basis. (55) In addition GSCC should continue to explore broader ways to describe distributions and the volatility that is associated with them. (56)

B. The Disallowance Percentages

In order to offset net settlement positions, GSCC will measure the degree of correlation between the price variation of securities. As a first step, GSCC will measure the degree to which the price movements are linearly related (*i.e.*, coefficient of correlation). This measurement will indicate the existence and strength of a linear relation (*i.e.*, the extent to which the increased [or decreased] value of a given security tends to be associated with the increased [or decreased] value of another). This calculation does not measure the level of movement between the sampled price variations. For this reason, GSCC will square the coefficient of correlation. This way, GSCC will be able to determine the percentage of correlated movement between two price variations.

It must be noted that these measurements do not imply any causal connection between the price variations of two correlated securities. Indeed, there can be no assurance that prices of the two securities will continue to vary in a related fashion. GSCC, however, believes that these measurements indicate the most recent market expectations of inter-related price movements for Government securities, and, as such, will reflect market activity geared towards offsetting positions.

GSCC will not assign offsetting values in situations where the decrease in the value of a security tends to be associated with an increase in the value of another security. This is designed to prevent a shortfall in the event of a default, particularly in the event the price of a defaulting member's short positions increase and the price of corresponding long positions decline precipitously. (57)

By calculating percentages of disallowance only for positively correlated price movements, GSCC provides a safeguard against potential financial losses resulting from sudden price movements. To provide adequate protection, however, GSCC must monitor the proposed correlation measures, and, in the event they should fail to conform to historical levels, GSCC should, in accordance with its Rules and Procedures, and in consultation with the Commission's Staff, adjust the corresponding coefficients of determination accordingly.

C. Additional Collection of Clearing Fund Deposits

1. Revised Clearing Fund Formula

The principal difference between the current and the proposed clearing fund formula is GSCC's determination to permit credits for offsetting net settlement positions. As previously discussed, the theory underlying this change is that certain price movements exhibit close correlation. GSCC's new system, however correctly recognizes that the offsetting values among historically related price movements are not perfectly correlated. A direct dollar-for-dollar offset for net settlement positions could leave GSCC exposed to great risk in the event that historically related price movements do not move in tandem. For this reason, GSCC's proposed formula is designed to require a minimum margin amount consisting of the greater of either 50% of the participant's total gross margin amount or the average offset margin amount. In addition, GSCC will add to the above calculation 125% of the absolute value of the netting member's averaae funds-only settlement obligation for the previous 20 business days.

2. Additional Collection of Fund Deposits

GSCC is concerned that, without the proposed revisions, the current clearing fund formula could result in reduced liquidity for participants. The Commission appreciates GSCC's concern and endorses its decision to allow credits for offsetting net settlement positions. In order to calculate a participant's clearing fund daily requirement, however, GSCC will average a participant's offset net settlement amount over the previous 20 business days. Under ordinary conditions, this calculation provides GSCC with sufficient liquidity to meet financial needs in the event of a default by a participant, without unnecessarily reducing liquidity for participants.

The Commission, however, is concerned that the proposed averaging of a participant's offset net settlement amount does not assess accurately the risk to GSCC in the event a participant's net settlement position for a particular day is substantially higher than the amount represented by the 20 business day average. While the Commission appreciates GSCC's effort to correct this situation by placing greater weight on more recent days within the 20 business days, the Commission recognizes, and GSCC agrees, that this procedure could fall short of detecting the risk to GSCC when a particular participant's trading activity is unusually high.

GSCC contends that a calculation of the clearing fund formula reflecting a participant's trading activity, appropriately offset, for the day when the clearing fund requirement is assessed (*i.e.*, participant's offset margin amount for the day when the clearing fund requirement is assessed) would subject participants to sudden, substantial increases in their clearing fund requirements on account of trading activity that does not necessarily expose GSCC or its members to significant risk. (58) For this reason, GSCC is amending its proposal to allow GSCC to collect, on a discretionary basis, additional contributions, on a same-day basis, when a participant's deposits to the clearing fund is less than $250,000 or below 25% of the amount yielded by the revised clearing fund formula as calculated by taking into acount the participant's net settlement obligation for the day when the computation is done, rather than the 20 business day weighted average. (59)

Clearing agencies should have an available liquid source of funds ready to meet their liquidity needs, which is based, among other things, on its assessment of risk. (60) Such arrangements give book-entry systems access to sources of readily available funding that will support timely settlement in the event a participant is unable to settle its obligations. (61) As amended, the proposal would allow GSCC to acquire additional fund deposits whenever GSCC detects a risk stemming from a participant's higher than usual net setflement position.

As a whole, the proposal will afford GSCC the opportunity to require adequate clearing fund deposits from participants while preventing an over-margining that would result in a liquidity drainage. The Commission, however, is concerned that the proposal that allows GSCC to collect additional fund deposits, on a discretionary basis, is only activated after the risk has been incurred and does not further the system's ability to settle in a timely manner. For this reason, GSCC should monitor, on a daily basis, participant's clearing fund contributions and use conservative judgment in determining whether a participant should increase the level of its clearing fund contributions to the amount yielded by a calculation of the clearing fund formula

that takes into account the participant's net settlement obligation for the day when the computation is done, rather than the 20 business day weighted average. (62) Likewise, the Commission expects GSCC to explore a manner of assessing clearing fund requirements that will allow it to control a ready and uncommitted source of funds that will serve as the main source of liquidity to meet temporary financing needs in order to ensure timely settlement of transactions.

D. Application of Clearing Fund Formula to US Agency and Multinational Development Bank Securities

The proposed rule change, as amended, would make all aspects of the revised clearing fund formula applicable to net settlement positions in securities issued or guaranteed by agencies of the United States Government or by corporations in which the United States has a direct or indirect interest. As such, the proposal would extend all the protection associated with GSCC's centralized, automated netting facilities to transactions involving these securities, thus reducing the likelihood of financial loss to parties trading in them. The Commission believes that in this regard, the proposal promotes the prompt and accurate clearance and settlement of securities transactions, and is, therefore consistent with the Act. (63)

E. Summary

The Commission preliminarily finds that the proposal is consistent with Section 17A of the Act. The Commission believes that in light of its significance to GSCC and its members, the proposed revisions to GSCC's clearing fund formula should be carefully monitored before they become a permanent feature. For this reason, the Commission is approving the proposal on a temporary basis until April 30, 1992. (64) To assist the Commission in determining whether the proposal should become a permanent part of GSCC's Rules and Procedures, the Commission expects GSCC to comply with the following undertakings:

1. GSCC will continue to monitor the adequacy of its new system and to make adjustments as necessary, on a regular basis. (65) In addition, GSCC should continue to consider ways to refine its analysis of price volatility, including procedures to consider the effects of dramatic price movements. (66)

2. GSCC will continue to monitor the proposed measures of correlation, and, in the event they should fail to conform to historical levels, GSCC will, in accordance with its Rules and Procedures, and in consultation with the Commission's staff, adjust the corresponding coefficients of determination accordingly.

3. GSCC will monitor, daily, its funding requirements to ensure that the clearing fund has sufficient liquidity, during periods of high volatility, to protect it from contingencies stemming from participants' daily net settlement obligations. On a monthly basis, GSCC will report to the Commission any situation where GSCC could make a special call for additional clearing fund deposits pursuant to GSCC Rules and Procedures, R. 4 section 9., and the amount assessed, if any.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act, (67) that the proposed rule change, SR–GSCC–89–13, be, and hereby is, temporarily approved until April 30, 1992.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. 17 CFR 200.30–(12) (1989).

Jonathan G. Katz,

Secretary.

Notes

(1) 15 U.S.C. 78s(b)(1) (1989).

(2) Securities Exchange Act Release No. 27580 (December 29, 1989), 55 FR 949 (January 10, 1990).

(3) Letters from Charles A. Moran, President, GSCC, to Ester Saverson, Jr., Branch Chief, Division of Market Regulation, Commission (December 13, 1989); and from Jeffrey F. Ingber, Associate General Counsel, GSCC, to Ester Saverson, Jr., Branch Chief, Division of Market Regulation, Commission (February 5, 1990).

(4) Securities Exchange Act Release No. 27728 (February 22, 1990), 55 FR 7396 (March 1, 1990).

(5) Letter from Jeffrey F. Ingber, Associate General Counsel, GSCC, to Ester Saverson, Jr., Branch Chief, Division of Market Regulation, Commission (March 16, 1990).

(6) Pursuant to the current proposal and the changes to the clearing fund formula contained in the concurrently issued Order, approving SR–GSCC–90–01, Securities Exchange Act Release No. 27902 (April 12, 1990), published elsewhere in this issue of the **Federal Register**, a participant's required clearing fund deposit will be the sum of two elements of the formula, funds-only settlement obligations and securities net settlement obligations. Expressed in mathematical terms the formula will be the following:

Total Amount of required clearing fund deposit = A + B where,

$A = 1.25(v)$

and

$B = (\Sigma i[x(y) - z])\ 20$

or $B = .50[x(y)]$, if, $.50[x(y)] > (\Sigma i([x(y)] - z]) > 20$

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v = Member's average daily funds-only settlement amount for last 20 business days;

x = Corresponding margin factor;

y = Dollar value of member's net settlement position;

z = credit for offsetting net settlement positions;

i = prior 20 business days during which GSCC calculates net settlement positions.

Pursuant to GSCC's proposal approved by Securities Exchange Act Release No. 27902, the funds-only settlement amount is determined by calculating, for a particular business day, the net total of the following: (a) trade adjustment for settling positions, (b) any marks-to-the-market owed for failed positions, (c) adjustments for coupon, and redemption payments, (d) the amount reported to a member during the previous business day's processing cycle as its funds-only settlement amount obligation ("opening balance"), (e) the aggregate settlement amount that a member has either received from or paid to GSCC since the end of the processing cycle immediately prior to the processing cycle during which the funds-only settlement amount is being calculated ("collected/paid amount"), (f) the total required forward mark allocation payment, and (g) the total forward mark allocation return amount. *Id.* (describing the calculation of a participant's funds-only settlement amount).

(7) As used in this order, a net settlement obligation is a member's obligation to deliver or receive securities to, or from, GSCC as a result of trades that were previously compared and netted in GSCC's trade comparison and netting systems. GSCC's trade netting system nets member trades in each eligible security issue by "comparing the aggregate par value amount of each purchase of an eligible netting security by the netting member * * * and each sale of an eligible netting security by the netting member * * *." GSCC, Rules and Procedures, R. 11 section 4. Trades accepted for netting are novated so that GSCC becomes the counterpart to the net delivery and receive obligation in each such issue. Securities Exchange Act Release No. 27006 (July 7, 1989), 54 FR 29798, 29799 (July 14, 1989).

(8) A participant may satisfy its clearing fund requirement by depositing cash, short-term US Treasury Securities, or letters of credit issued by a GSCC approved bank. Securities Exchange Act Release No. 27902, *supra* note 6 (describing the clearing fund deposits and collateralization requirements).

(9) Currently, for purposes of the clearing fund formula, a netting member's secruities settlement obligation is calculated based on the absolute value of each net settlement position, without taking into account offsetting positions.

(10) A "long position" represents the right to receive securities and the correlative obligation to pay a sum of money. A "short position" represents the obligation to deliver a quantity of securities and the correlative right to receive funds.

(11) A long position in a US Treasury Note, for example, could, to a certain extent, provide a potential economic offset to the risks of holding a short position in a US Treasury Bond with a longer date to maturity. A price increase of the US Treasury Bond implies that the cost of purchasing the US Treasury Bond will increase. Because the US Treasury Note historically increases in price when the US Treasury Bond increases in price, the increasing value of the Note can be used to offset, in part, the cost of purchasing the US Treasury Bond.

(12) The proposal approved by this Order does not effect any changes to the formula's first component. The Commission, however, is concurrently issuing another Order which approves changes to that component of the clearing fund formula, which is designed, essentially, to collateralize a member's net payment obligations to GSCC. Securities Exchange Act Release No. 27006, *supra* note 7 at 29802.

(13) *Id.* at 29803.

(14) 15 U.S.C. 78c(a)(42)(A), (B) and (C).

(15) Pursuant to its proposal, GSCC intends to extend the application of the formula to net settlement positions in securities issued by the following entities: African Development Bank, Asian Development Bank, Farm Credit System (including the Federal Land Banks and Farm Credit Banks), Farmers Home Administration, Federal Home Loan Banks, Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, Inter-American Development Bank, International Bank for Reconstruction and Development (World Bank), Resolution Funding Corporation, Student Loan Marketing Association, Tennessee Valley Authority, United States Postal Service, and Washington Metropolitan Area Transit Authority.

The proposed rule change will not make mortgage-backed securities and Separate Trading of Registered Interest and Principal of Securities ("STRIPS") eligible for netting. These securities, therefore, will not be covered by the proposed revisions to the clearing fund formula. Letter from Jeffrey F. Ingber, *supra* note 3.

(16) GSCC has established a margin factor for each maturity range within each product group. That factor is a percentage, which is generally designed to measure the potential volatility of prices in that maturity range. GSCC will collect data from its Automated System for the Assessment of Price Volatility in the Government Securities Markets in order to determine whether the established margin needs to be increased in light of market condition. *See infra* II.C (describing GSCC's system for the assessment of price volatility). The following are the current margin factors:

MARGIN FACTORS FOR TREASURY SECURITIES

Time to maturity	Percentage factor
1 day through 3 months	0.040
3 months plus 1 day through 6 months	0.080
6 months plus 1 day through 1 year	0.150
1 year plus 1 day through 2 years	0.300
2 years plus 1 day through 4 years	0.500
4 years plus 1 day through 5 years	0.625
5 years plus 1 day through 7 years	0.750
7 years plus 1 day through 10 years	0.935
10 years plus 1 day through 15 years	1.250
15 years plus 1 day or greater	1.450

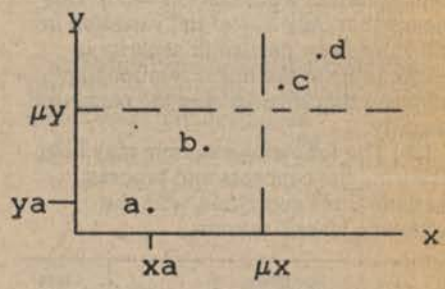
(17) As previously discussed a net settlement position includes a participant's total obligation to deliver or receive securities as calculated by GSCC's trade comparison and netting process. *See supra* note 7. GSCC will add to a participant's net settlement obligation for a particular day, net open positions that failed to settle on previous days. In order to calculate the gross margin amount, GSCC will multiply these net positions, on a security by security basis, against the appropriate margin factors.

(18) For a discussion of credits for offsetting positions see *infra* section IV.B.

(19) To the extent permissible by GSCC's proposed rule change, GSCC will offset net settlement positions in all eligible netting securities, including securities issued or guaranteed by agencies of the United States Government or by corporations in which the United States has a direct or indirect interest and Treasury notes and U.S. Treasury bonds. *See* GSCC Rules and Procedures, R. 1 (defining eligible netting security).

(20) GSCC will classify securities following the same schedule of remaining maturities set for margin percentages. *See supra* note 16.

(21) In this formula, "r" represents the coefficient of correlation. "σxy," the numerator, measures the covariance of the changes in price of two different securities (*i.e.*, the degree to which the variables are linearly related, see diagram below).



GSCC will calculate oxy by multiplying the deviation from the mean for each price variation in each security and adding the products. Thus, where μ represents the price mean for a security, $\sigma xyxy = \Sigma(x-\mu x)\,(y-\mu y) = (xa-mx)\,(ya-\mu y) + (xb-\mu x)\,(ya-\mu y)$ * * *

The formula's denominator adds the deviations for each price variation from the mean price for that security and multiplies the result by the sum of the deviations from the other security's mean price:

$$\text{i.e.,}\quad \sqrt{\Sigma(x-\mu x)^2}\ \sqrt{\Sigma(y-\mu y)^2}$$

Otherwise stated, the coefficient of correlation, r, is given by the formula

$$r = \frac{\Sigma(x-\mu x)(y-\mu y)}{\sqrt{\Sigma(x-\mu x)^2}\ \sqrt{\Sigma(y-\mu y)^2}}$$

(22) A coefficient of correlation with a negative value implies that a decrease in the value of one security tends to be associated with the increase in the value of another security. GSCC will not offset net settlement positions with a negative coefficient of correlation because such

position could result in a financial loss for GSCC in the event it has to liquidate a participant's position in such securities.

(23) The value of the coefficient of determination is the percentage of the variability in one security that can be attributed to a linear relationship between that security and another security. The coefficient of determination provides a measure of the strength of the linear relationship between two securities that is easier to interpret than the coefficient of correlation. For example, if the coefficient of correlation between two securities is .5, the coefficient of determination would be $(.5)^2=.25$. This means that only 25% of the variation in the values of a particular security is attributable to the linear relationship between that security and the compared security.

(24) The following example may help illustrate the concepts and process. Assume three securities, with the following classifications:

Securities	Class
1	A, B
2	C

The coefficient of correction, "r," for the securities in Class 1 will be:

$r(A \cap C)=.5$ and $r(B \cap C)=.9$.

The coefficient of determination for the same products will be:

$r^2=(.5)^2=.25$ and $r^2=(.9)^2=.81$.

If the level of trading activity for each security is 1, the average of r^2 will be given by

$([.25][1]+[.81][1])\div 2=1.06\div 2=.53$.

The disallowance factor for trades between Classes 1 and 2 will be:

$1-.53=.47$.

(25) *See supra* section II.A.

(26) Initially, GSCC will use a weighing factor of one for each day but plans to monitor the 20 day average to determine the type of weighing factor necessary to accurately reflect the risk to GSCC with regard to securities settlement.

(27) *E.g.*: After netting is completed, a dealer has only the following obligations:

(1) A deliver obligation of $12 million of Treasury Bond A, which has a remaining maturity of 29 years, requires a margin percentage of 1.450 and belongs to offset class G, and

(2) A receive obligation of $4 million of Treasury Note B, which has a remaining maturity of 3 years, requires a margin percentage of .500 and belongs to offset class D.

The calculation of the second element of the formula is the following:

Step 1—calculation of gross margin amount

12 million (.01450)+4 million (.00500)=174,000+20,000=194,000.

Step 2—calculation of the credit

Because GSCC will only offset equivalent gross margin amounts, the calculation will allow only $20,000 of the margin amount of the deliver obligation to offset $20,000 of the margin amount of the receive obligation. Thus, with a disallowance percentage of 40,

credit=(20,000+20,000) (1.00−.40)=(40,000 (.60)=24,000).

Step 3—final calculation

offset margin amount=gross margin amount−credit=194,000−24,000=170,000

(For the purpose of this example assume that the weighted average offset margin amount over the previous twenty business days is the same as the offset margin amount.)

The second element of the clearing fund formula=the greater of,

.50(194,000)=97,000, or average offset margin amount=170,000.

Because 17,000>97,000 second element of the clearing fund formula=average offset margin amount=$170,000.

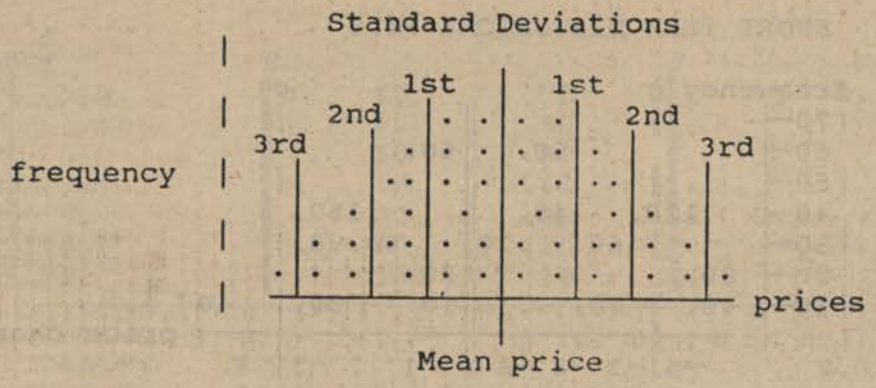
(28) Whenever any such notice is made available to a participant before 3:00 p.m. (eastern time ["E.T."]), the participant must increase its deposits to the clearing fund to the level of the "required clearing fund deposit" (as this term is defined for purposes of this Rule) by the close of business of the day when it receives the notice. If a notice is made available to a participant after 3:00 p.m. (E.T.) the participant must satisfy its additional fund requirement by noon of the following business day.

(29) This Rule allows GSCC to require from a netting member under surveillance to make and maintain a deposit to the clearing fund of 200% or more of its highest single business day's fund deposit (as calculated pursuant to the proposed amendment to the clearing fund formula) during the most recent 20 business days in order to protect GSCC or other members. GSCC Rules and Procedures, R. 4 section 3.

(30) GSCC, *Summary of Design Plan and Schedule for the Implementation of an Automated System for the Assessment of Price Volatility in the Government Securities Market* 1 (October 31, 1989).

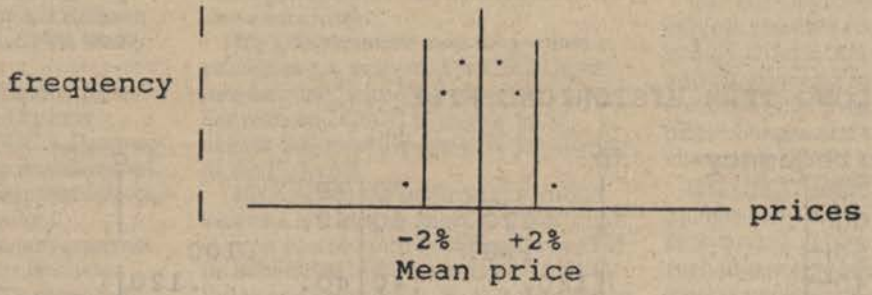
(31) This system will give GSCC the ability to distinguish retail prices and prices that do not reflect the closing price of the security as traded in the cash markets, such as the price of government securities in repurchase agreements.

(32) Trade sizes are defined by using a precentage of the average value of all trades. GSCC *supra* note 30, at 4. The figure below illustrates GSCC's pricing system for a specific security:



The points in the figure represent compared trades, plotted by price and number of securities traded. Trades outside the second or third standard deviations, depending on their size, would be subject to monitoring.

(33) The figure below illustrates how GSCC's pricing system would look like under these circumstances:



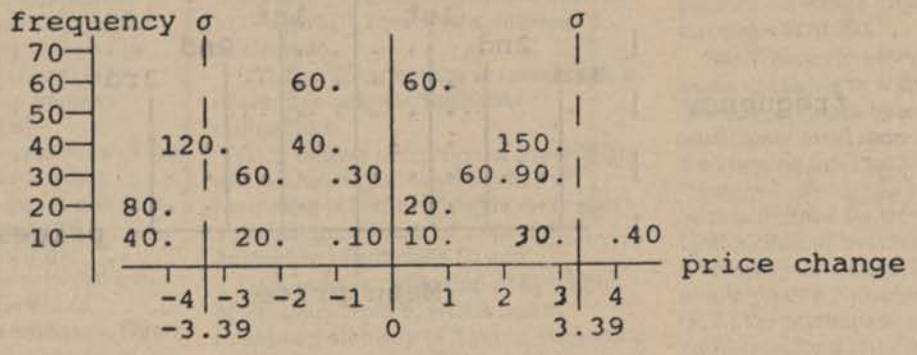
In order to determine the parameters, GSCC will first average all compared trade prices, with each price weighted appropriately by its relative size. The system will then select a percentage of this average as a parameter. In the figure above, 98% of all trades fall within the parameters established by the system. Two trades, constituting 2% of all trades, fall outside the established parameters. The system would subject these trades to monitoring.

(34) This would be the case, for example, when, due to market conditions, a high volume of a particular government security is traded at a very high price during the morning and, as a result of a normalization of market conditions, a moderate volume of the same security is traded at a substantially lower price during the afternoon. Under these circumstances, the high morning trade volume could cause the par-weighted average to reflect a price which is different from the day's inter-dealer closing price.

Currently, GSCC is developing a system to alert GSCC whenever a par-weighted average is substantially different from the expected inter-dealer closing price. This system will have an on-line capacity to derive implied pricing measures from collected data and will provide GSCC with a matrix-like pricing capability. Through this system, GSCC will have the ability to create a model yield curve, by using a set of highly traded government securities and interpolating theoretical yield curve points for all other maturities and products. GSCC *supra* note 30 at 8–7.

(35) The figures below illustrate a theoretical calculation of a margin interval for a government security. Figure (A) represents price changes during the previous twenty business days and figure (B) represents price changes for the same security during the previous year. The spread of price changes indicates the number of securities traded at a difference from the mean.

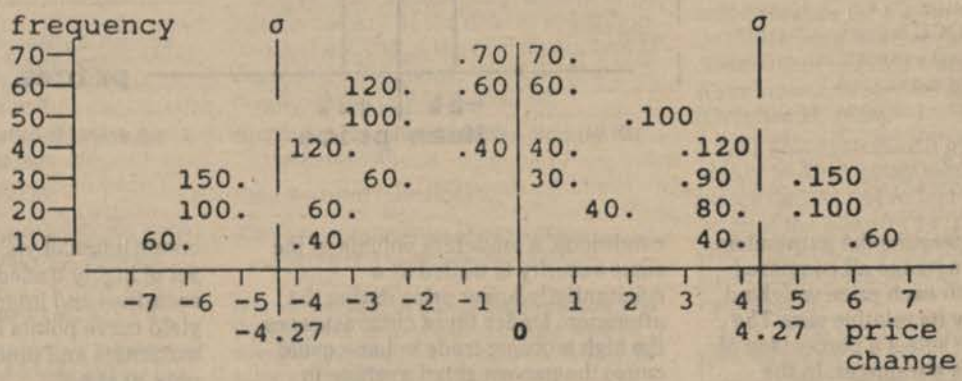
(A) SHORT TERM HISTORICAL FILE



(A) Short Term Historical File

Figure (A) has a standard deviation of 6.77. This means that the range of price changes will occur mostly between 3.39 below the mean price and 3.39 above the mean price. In this example, a calculation of the number of prices comprised within these parameters indicates that 82.61% of all price variations during the sampled period fall within the standard deviation.

(B) LONG TERM HISTORICAL FILE

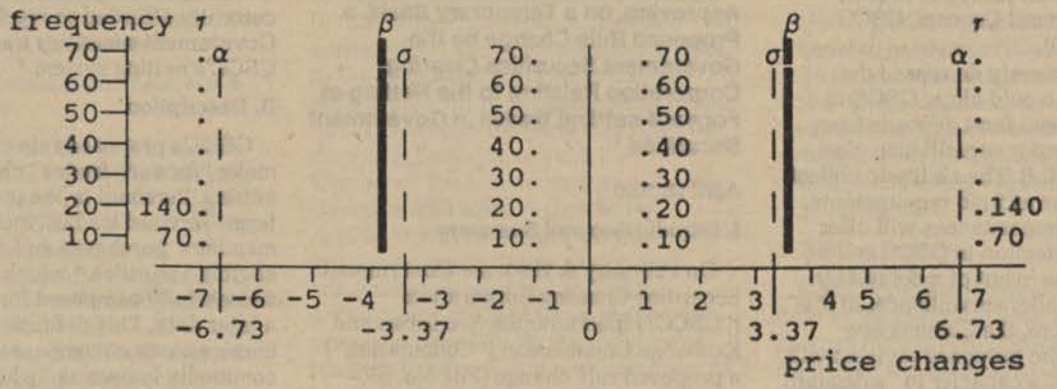


(B) Long Term Historical File

Figure (B) has a standard deviation of 8.64. In this figure 68.37% of the price variation range falls within said parameter.

In order to calculate the margin factor for this security, the system will compare the standard deviations in figures (A) and (B), choose the one encompassing the wider range of price variations and double it. In this example, the system will select the standard deviation for figure (B) which allows for an 8.64 movement away from the system price *(i.e.*, 4.27 below and 4.27 above the average price). The margin factor for this security, therefore, will be twice the standard deviation for figure (B), or, 8.64·2=17.28.

(36) The figure below illustrates an unusual distribution of price changes. In this example, 57.14% of the observed price changes fall within the standard deviation, σ. In order to determine the margin factor the system will double the range of the standard deviation to 13.46, α. As the figure indicates, however, the number of frequencies falling within α continues to be 57.14%, thus failing to reach the desired confidence level of 95%. In order to reach this level of confidence, the system will set an alternate deviation parameter, β, at 3.5. This parameter will ensure that, once the margin factor is calculated (*i.e.*, the deviation is doubled), at least 95% of all price variations will be encompassed within the established margin interval, τ.



(37) 15 U.S.C. 78q–1.

(38) Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920, 41929 (June 23, 1980) (footnote omitted).

(39) Securities Exchange Act Release No. 27006, *supra* note 7 at 29810.

(40) Securites Exchange Act Release No. 23167 (April 22, 1986), 51 FR 16127, 16131 (April 30, 1986).

(41) In 1986, the Commission approved a similar proposal by the Options Clearing Corporation ("OCC"). Pursuant to this proposal, OCC has implemented a price assessement system that allows it to determine the maximum, anticipated one-day price movement in assets underlying options contracts. OCC's system, like GSCC's proposed volatility assessment system, is based on a historical analysis of price changes in the underlying assets, which ensures protection against a price movement equal to, or exceeding at least, 95% of the daily price changes in the underlying asset for the last three months or for the previous year, whichever yields the more conservative result from OCC's perspective. Similar to GSCC's proposal, OCC's margin system also allows for the creation of classes and product groups. This classification allows OCC to recognize the hedge value of various closely related positions by allowing a direct offset of credits within class groups and within product, to the extent that the class groups show a close price correlation. *Id.*

(42) Act section 17A(a)(3)(A), 15 U.S.C. 78q–1(a)(3)(A).

(43) Securities Exchange Act Release No. 27006, *supra* note 7 at 29810.

(44) *See id.*

(45) *Id.* at 29809.

(46) *Id.*

(47) For example, in order to be able to better assess market volatility and improve its ability to ascertain price trends, GSCC has committed itself to examine and compare its assessment of price volatility for Government securities netted at GSCC and the level of volatility projected as a result of trading in the derivative markets for the same securities.

(48) This situation may arise when securities are delivered to GSCC by a member just before the close of the Fedwire and GSCC is unable to re-deliver the securities prior to the closing of the Fedwire.

(49) A failed net settlement position means a net long or short position "that is open one or more Business Days after its Scheduled Settlement Date." GSCC, Rules and Procedures, R. 1. According to GSCC's Rules the value for such positions will reflect the system price established for the corresponding security each business day. GSCC, Rules and Procedures, R. 12 section 4.

(50) *See id.* at R. 11 section 8 (describing the manner in which fail net settlement positions are marked to the market).

(51) *Id.* at R. 13 section 1; *see* Securities Exchange Act Release No. 27006, *supra* note 7 at 29799.

(52) *See* Act section 17A(a)(3)(A), 15 U.S.C. 78q–1(a)(3)(A).

(53) Throughout 1987 the bond yields hit very high levels. On May 19 prices of actively traded 30-year Treasury bonds fell about two points, or $20 for each $1,000 face amount. Winkler & Herman, "Bond Yields Hit Highest Level," *Wall St. J.*, May 20, 1987, at 3, col. 1. Less than a month later, on June 2, the yield of the most recent 30-year Treasury Bond soared to 8.93%, from an 8.62% yield on May 31 and an even lower 7.55% on March 26. On that date, actively traded Treasury bonds took their biggest one-day plunge in more than five years, falling 3¼ points, or around $32.50 for each $1,000 face amount. Winkler & Herman, "Volcker's Retirement Sends Bonds, Dollar Plunging on Doubts About Future Policy," *Wall St. J.*, June 3, 1987, at 3, col. 1.

(54) The Commission expects GSCC to explore possible revisions to its current standard deviation analysis, including adjusting margin intervals to encompass, at least, 99% of the observed price changes and the cost of such changes to GSCC and its membership.

(55) GSCC's Rules authorize GSCC to increase any of the margin factor percentages upon a determination that such increase is appropriate in light of market experience and conditions. GSCC may decrease margin factor percentages upon submission and review of a proposed rule change pursuant to section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2). Securities Exchange Act Release No. 27006, *supra* note 7 at 29803 n. 50.

(56) GSCC should explore alternative ways of measuring margin intervals in order to account for sudden, albeit infrequent, substantial price movements. One such statistical measure is the kurtosis. The kurtosis measures the peakness or flatness of a distribution relative to a normal distribution. As a result, this measurement indicates how much a margin interval needs to be increased in order for the distribution to appear more normal, thus placing greater emphasis on very sizeable movements that in a distribution will be farther away from the mean than most price fluctuations.

(57) Under these circumstance, the financial loss for GSCC could be compounded by the requirement to pay fail mark adjustment payments. GSCC Rules and Procedures, R. 13 section 1.

(58) Telephone conversation between Julius R. Leiman-Carbia, Staff Attorney, Division of Market Regulation, Commission, and Jeffrey F. Ingber, Associate General Counsel, GSCC (March 8, 1990).

(59) As previously discussed the proposal also would allow GSCC to collect additional fund deposits from participants under surveillance. *See supra* section II.B. The ability to collect increased clearing fund requirements under these circumstances will offer additional protection to GSCC and its members in the event of a default by participants under surveillance. In this regard, therefore, the Commission believes that the proposed revision will enhance GSCC's capacity to "safeguard securities and funds in its custody or control, or for which it is responsible." Act section 17A(a)(3)(A), 15 U.S.C. 78q–1(a)(3)(A).

(60) *See* Securities Exchange Act Release No. 27006, *supra* note 7 at 29810 (quoting Securities Exchange Act Release No. 16900, *supra* note 38 at 41929).

(61) Staff Federal Reserve System, *Proposals for Modifying the Payments System Risk Reduction Policy* 89 (May 1989).

(62) GSCC should report to the Commission, on a monthly basis, any situation where a participant could be required to contribute additional clearing fund deposits as a result of a special call pursuant to GSCC Rules and Procedures, R. 4 section 9 and the amount assessed, if any.

(63) Act section 17A(a)(3)(F), 15 U.S.C. 78q–1(a)(3)(F).

(64) The Commission expects GSCC to file for an extension of approval of the proposed rule filing by January 13, 1992.

(65) GSCC may increase any of the margin factor percentages upon a determination that such increase is appropriate in light of market experience and conditions. GSCC, however, may decrease margin factor percentages upon submission and review of a proposed rule change pursuant to section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2).

(66) GSCC will examine and compare its assessment of price volatility for Government securities netted at GSCC and the level of volatility projected as a result of trading in the derivative markets for the same securities. In addition, GSCC expects to be in a position to report on this comparative analysis on a daily basis.

(67) 15 U.S.C. 78s(b)(2).

[FR Doc. 90–9154 Filed 4–19–90; 8:45 am]
BILLING CODE 8010–01–M

[Release No. 34–27902; File No. SR–GSCC–90–01]

Self Regulatory Organizations; Order Approving, on a Temporary Basis, a Proposed Rule Change by the Government Securities Clearing Corporation Relating to the Netting of Forward-settling trades in Government Securities

April 12, 1990.

I. Introduction and Summary

On February 9, 1990, the Government Securities Clearing Corporation ("GSCC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR–GSCC–90–1) under section 19(b) of the Securities Exchange Act of 1934 ("Act").[1] The proposed rule change establishes the procedure for the netting of forward-settling Treasury security trades. On March 26, 1990, GSCC amended the proposed rule change in order to revise the funds-only settlement component of its clearing fund formula, and to allow for additional collections of clearing fund deposits on a discretionary basis.[2] Notice of the proposal appeared in the **Federal Register** on March 13, 1990.[3] The Commission did not receive any comments regarding the proposal. For the reasons discussed below, the Commission is temporarily approving the proposed rule change until April 30, 1992.

On May 24, 1988, the Commission temporarily approved GSCC's application for registration as a clearing agency under Section 17A of the Act,[4] authorizing GSCC to provide trade comparison services for members in government and agency securities.[5] On July 7, 1989, the Commission approved a proposed rule filing authorizing GSCC to complete the basic core of its services by implementing safeguards designed to limit foreseeable financial exposure to GSCC and its members as a result of its netting by novation settlement system.[6] The proposals under consideration today would authorize GSCC to extend to the forward-settling trading of Government securities the protection currently afforded to regular-way Government securities trades by GSCC's netting system.[7]

II. Description

GSCC's proposed rule changes would make "forward trades" eligible for netting. Pursuant to the proposal, the term "forward trades" includes members' purchases and sales of eligible securities,[8] which have been successfully compared for settlement on a later date. This definition encompasses encompasses trades commonly known as "when, as, and if issued" ("when-issued" or "W/I" trades).[9] When-issued trading extends from the day the auction is announced [10] until the issue day of the Treasury security traded.[11] Usually,

[1] 15 U.S.C. 78s(b) (1989).

[2] Letter from Jeffrey F. Ingber, Associate General Counsel, GSCC, to Ester Saverson, Jr., Branch Chief, Division of Market Regulation, Commission (March 23, 1990).

[3] Securities Exchange Act Release No. 27757 (March 2, 1990), 55 FR 9386 (March 13, 1990). The Commission did not publish notice of the amendments to the proposed rule filing because they do not substantively change the proposal as originally noticed in the **Federal Register**.

[4] 15 U.S.C. 78q–1.

[5] Securities Exchange Act Release No. 25740 (May 24, 1988), 53 FR 19839 (May 31, 1988).

[6] Securities Exchange Act Release No. 27006 (July 7, 1989), 54 FR 29798 (July 14, 1989).

[7] Concurrent with the issuance of this Order the Commission is approving a proposal by GSCC (File No. SR–GSCC–89–13), which, among other things, amends the securities net settlement component of the clearing fund formula. Securities Exchange Act Release No. 27901 (April 12, 1990), published elsewhere in this issue of the **Federal Register**.

[8] Pursuant to GSCC's Rules and the changes contained in the concurrently issued Order, approving SR–GSCC–89–13, eligible securities include securities falling within the definitions set forth in sections 3(a)(42)(A), (B) and (C) of the Act, 15 U.S.C. 78c(a)(42)(A), (B) and (C). These definitions include securities that are direct obligations of the United States, obligations guaranteed as to principal or interest by the United States or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest. *See* GSCC Rules and Procedures, R. 1; *see also* Securities Exchange Act Release No. 27901, *supra* note 7.

[9] These are trades typically involving "a lag between the time a new * * * [security] is announced and sold and the time it is actually issued." Government securities trade on a "when-issued" basis "between the day they are announced and the day they are settled." M. Stigum, *After the Trade: Dealer and Clearing Bank Operations in Money Market Securities* 298 (1988).

[10] The U.S. Treasury relies on auctions carried out by the Federal Reserve System to sell new notes and bonds. The Treasury announces a new issue a week or more before the auction date. The announcement states the amount to be issued, the maturity date of the securities and their denomination. In addition, the announcement designates the series and the identifying CUSIP numbers for the securities to be issued.

[11] Auctions of Treasury securities are based on a yield-bid system. During the auction period, participants bid yield to two decimal points for specific quantities of the new issue. After bids are received, on the basis of both the bids and the amount it wishes to borrow, the Treasury determines the price below which bids were not accepted ("stop-out price"). The Treasury then rounds the value of the coupon on the security to the nearest one eighth of 1% necessary to make the average price charged to successful bidders equal to $100.00 or less. Once the coupon on the issue is established, each successful bidder is charged a price, which is determined so that the yield-to-

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there is a ten day lag between the time securities are auctioned and the time they are issued. GSCC's proposal will make W/I trades eligible for netting during this period, once the price of the security has been determined.

A. Proposed Comparison of Forward-Settling Trades

On May 24, 1988, the Commission approved GSCC's comparison service procedures for forward-settling transactions.[12] GSCC's current proposal amends Rule 7 and revises its Procedures. In addition, the proposal will add or modify several definitions contained in GSCC's Rule 1. As a result of these revisions, GSCC will expand the scope of its comparison service, clarifying the existing operational requirements and setting forth additional procedures.

GSCC's proposal clarifies the procedure to allow participants to submit data for forward-settling trades prior to the date of the auction of the securities.[13] Such data will not be compared on a price basis, but, rather, on a yield basis. Once compared, however, such data must be re-submitted by the parties to the trade, after the auction, for final comparison of price and settlement information. The comparison operation for forward-settling trades will continue to be conducted in the same manner as regular trades.[14]

GSCC's proposal also sets forth a schedule for the deletion of trade data submitted to the comparison system. Upon comparison, data on trades eligible for netting will remain in the comparison system until the processing cycle[15] prior to the scheduled settlement data[16] for such trades. GSCC will hold uncompared trade data for regular and forward-settling trades in the comparison system until the earlier of: (a) the processing cycle prior to the scheduled settlement date for such trades, or (b) the processing cycle after the second business day after the date of submission of such data. Compared data on comparison eligible trades, which are not eligible for netting,[17] will be deleted on the processing cycle during which such comparison is reported to GSCC participants.[18] GSCC may change the proposed schedule for the deletion of trade data after giving participants a 15 business day prior notice.[19]

B. Proposed Netting Service for Forward-Settling trades

GSCC proposes to extend the netting system to the settlement of forward-settling transactions that have been successfully compared on a price basis. To implement this system, GSCC proposes to amend two rules and add a new rule. These revisions will set forth operational requirements for the system and the respective rights and obligations of GSCC and its members.[20]

1. Trades Eligible for Netting

Under GSCC's proposal, trades with a scheduled settlement date of 15 business days or less after the business day on which the comparison report for the trade data is issued would be eligible for netting if such trades meet the already established netting eligibility requirements.[21]

2. Netting Process

GSCC's proposal establishes a new Rule 14 that sets forth the netting process for forward-settling securities. As part of the proposal, GSCC will calculate a participant's forward net settlement position on each successive business day from the first day when the final price and the settlement value of a forward trade is compared until the processing cycle immediately prior to the scheduled settlement date for such position ("forward period"). GSCC will calculate a participant's forward net settlement position by comparing the aggregate par value amount of each purchase and each sale of the securities with a distinct CUSIP[22] that comprise the forward trades underlying such positions. The calculation of the forward net settlement position will yield the anticipated amount of securities that, on the scheduled settlement date, a netting member will be obligated to either receive from or deliver to GSCC.

GSCC will report each forward net settlement position by CUSIP number in a report issued on the morning of each business day during the forward period

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maturity on a bidder's securities equals the bidder's yield bid. Stigum, Fabozzi, *U.S. Treasury Obligations*, in The Handbook of Fixed Income Securities 261–62 (F. Fabozzi, I. Pollack ed. 1983).

[12] Securities Exchange Act Release No. 25740, *supra* note 5 at 19840.

[13] Trade data submitted for comparison must be entered, on an item-by-item basis or via bulk transmission, by the time established by GSCC and should include quantity, security identification, contra-party and trade value. In addition, GSCC may require the submission of additional identifying data. GSCC Rules and Procedures, Proc. II(B)(1).

[14] Upon submission of trade data, GSCC will validate and match the information in order to ensure that the details of each trade are in agreement. GSCC will then generate a report setting forth whether the trade has been compared, remains uncompared or is pending comparison. Compared trades are those where there is an exact match of all data except for contract amount, where members can specify a tolerance within which money settlement amounts may vary. Uncompared trades are those for which the counterpart either did not submit data or did not submit data which agreed in all respects. Trades pending comparison are those where the data submitted by another party against the member did not match any trade the member submitted. *Id.*

[15] A processing cycle encompasses the time from which the data on the trade is submitted until output is generated by GSCC the following morning.

[16] GSCC's proposal revises the existing definition of scheduled settlement date, to mean: "the earliest Business Day on which the trades underlying a Net Settlement Position or a Forward Net Settlement Position, as applicable, are scheduled to settle, regardless of whether such trades actually settle on such Business Day." *Cf.* GSCC Rules and Procedures, R. 1 (July 24, 1989) (defining the same term prior to the amendment under consideration).

[17] This would include trades compared on a yield basis and other comparison eligible trades such as those involving ineligible netting securities such as zero coupon bonds.

[18] In addition, GSCC's filing sets specific deletion schedules for the following transactions:

(1) *As-of-Trades*—Data on as-of trades that remain uncompared will be pendent in the system until the processing cycle after the second business day after the date of submission of such data.

(2) *Forward Trades*—Data on uncompared, forward trades with a scheduled settlement date that is the same as the issue date for the securities involved will be kept in the system until the processing cycle prior to such date. The system will keep the data on uncompared, forward trades for which the scheduled settlement date is after the securities' date of issuance, until, at least, the processing cycle prior to the issue date.

(3) *Yield Comparison Trades*—Data on uncompared trades to be compared on a yield basis and with the same issuance and scheduled settlement dates, which are submitted prior to or on the auction date will remain pendent in the system until the processing cycle after the auction.

[19] In addition, such changes must be filed with the Commission, pursuant to section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1), which requires self-regulatory organizations to file proposed rule changes for review by the Commission, pursuant to the requirements of the Act.

[20] Like the proposed amendments to the comparison service, the revisions to the netting system also will add or modify several definitions that appear in GSCC's Rule 1.

[21] In addition to the proposed requirement, in order to be eligible for netting a trade must meet the following requirements:

(1) Trade data must have been compared through GSCC's comparison system;

(2) The data on the trade is listed on a report that has been made available to netting members;

(3) Netting of the trade will occur on or before its scheduled settlement date;

(4) Both parties to the trade are netting members; and

(5) The underlying securities are eligible netting securities.

Notwithstanding these requirements, GSCC may exclude any trade or trades from the netting system. GSCC Rules and Procedures, R. 11 section 2.

[22] "CUSIP" is an acronym for the Committee on Uniform Securities Identification Procedures. The CUSIP numbering system was developed by a committee of the American Bankers Association to identify specific securities issues. Each eligible netting security issue has its own separate CUSIP number that GSCC uses in its netting system to group trades for the net.

applicable to such positions.[23] Forward net settlement positions are fixed at the time this report is made available to members. At that time, the obligations ensuing from a netting member's forward net settlement positions are novated. GSCC, therefore, becomes the counterpart to the net delivery and receive obligations in each such issue, so that all delivery, receive, and related payment obligations between netting members that were created by the forward trades, comprising each forward net settlement position, are terminated and replaced by the deliver, receive and related payment obligations to GSCC.[24]

Forward net settlement positions automatically convert into net settlement positions on their scheduled settlement day.[25] Receive and deliver obligations with regard to net settlement positions, however, will not be generated until the processing cycle immediately prior to the scheduled settlement date for the underlying trades, in order not to alter the timing of settlement. At that time, GSCC will allocate deliver and receive obligations on a random basis to netting members with corresponding receive and deliver obligations of like quantity of the security with the same CUSIP number.[26]

C. Financial Safeguards

The proposal could present credit and liquidity exposure to GSCC and other members utilizing the system. For this reason, GSCC is implementing safeguards, including clearing fund and margin requirements for positions involving forward-settling trades, which are designed to protect GSCC from the liquidation exposure stemming from the size of net settlement positions in forward-settling trades.

1. Required Forward Mark Allocation Payment

GSCC will assess netting members, except those who are inter-dealer brokers,[27] a required forward mark allocation amount with regard to forward net settlement positions. Pursuant to GSCC's proposal, this payment amount will be determined each business day during the forward period on a CUSIP-by-CUSIP basis. The required forward mark allocation amount is based on the difference in dollar value between the aggregate amount of the contract values for the forward trades of the securities comprising each forward net settlement position and the aggregate of the system price for the same positions on the day when such amount is calculated.[28] If the calculation yields a negative amount, a participant will have a forward debit mark amount. A positive calculation would result in a forward credit mark amount, for which a participant will not owe a forward mark allocation amount; GSCC will not make payments to participants with forward mark allocation credits.

In order to determine the forward mark allocation for a netting member with a forward debit mark amount, GSCC will first calculate the total forward debit marks of all netting members with forward settling trades. GSCC will then establish a fraction the numerator of which will be the total debit mark of the five largest forward debit mark amounts among all netting members (including, for this purpose, netting members who are inter-dealer brokers), and the denominator of which will be the total forward debit mark amounts of all netting members (excluding, for this purpose, netting members who are inter-dealer brokers). GSCC will derive the forward mark allocation amount for each netting member with forward settling trades by multiplying the member's forward debit mark amount by this fraction. The proposed fraction, however, will be neither higher than 75% nor less than 25% of a participant's forward debit mark amount.

Each business day after the first business day of the forward period, GSCC will establish a new required forward mark allocation payment obligation. During the morning of each business day, as part of the Funds-only Settlement Report, GSCC will inform each netting member the amount of its required obligation.[29] Forward mark allocation payments must be made pursuant to the funds-only settlement amount payment process set forth in GSCC's Rules.[30]

2. Clearing Fund Requirements

Concurrent with this Order, the Commission is approving revision to GSCC's clearing fund requirement formula.[31] As revised, the formula calculates a netting member's required clearing fund deposit by adding two elements.[32] The first element ("funds-only settlement element") is designed, essentially, to collateralize a member's net payment obligations to GSCC. The second element of the clearing fund formula ("securities net settlement element") is designed, in effect, to collateralize GSCC's guarantee of a member's securities deliver and receive obligations.[33]

Currently, GSCC computes the funds-only settlement element of the clearing fund formula by comparing two components. The first component ("weighted rolling average") is equal to 125% of the absolute value of the netting member's average funds-only settlement obligation [34] for the previous 20

[23] The reports will be available when GSCC has completed its processing cycle for the preparation of such reports and has released them to GSCC's data output facility, generally between 4:00 a.m. (Eastern Time ["e.t."]) and 7:00 a.m. (e.t.) on the morning after the data on the trade is submitted for comparison on a price basis.

[24] *See* Securities Exchange Act Release No. 27006, *supra* note at 29799 n. 17 (describing the process of novation for regular settling trades).

[25] Under the regular netting system, and, therefore, as applied to forward net settlement positions on the scheduled settlement date, a net settlement position is a member's obligation to deliver or receive securities to, or from, GSCC as a result of trades that were previously compared and netted in GSCC's trade comparison and netting systems. GSCC, Rules and Procedures, R. 11 section 4.

[26] Once a forward net settlement position is converted into a net settlement position, the underlying securities are settled, like regular trades, on settlement date and in same-day funds. *See* GSCC Rules and Procedures, R. 12. A position that does not settle on settlement date will become a fail ("fail settlement position"). Fail net settlement positions will be reported daily to the appropriate member in a fail report until the position is settled. Fail net settlement positions are not netted with any other deliver or receive obligations, instead, they are offset with other fails. GSCC, however, will examine a particular day's receive or deliver obligation in order to determine whether they may be matched with previously failed positions. Securities Exchange Act Release No. 27006, *supra* note 6 at 29800.

[27] an inter-dealer broker is a GSCC netting member who acts exclusively as a broker on behalf of netting members and/or eligible netting applicants. GSCC Rules and Procedures, R. 1.

[28] *See* Securities Exchange Act Release No. 27901, *supra* note 7 (approving GSCC's automated system for the assessment of market price volatility).

[29] The Fund-only Settlement Report states the funds-only settlement amount that a member is either required to pay to or receive from GSCC. *See infra* section II.C.2. (describing the calculation of funds-only settlement amount).

[30] Under GSCC's Rules, a netting member must pay its funds-only settlement obligations through the Federal Reserve Wire Transfer System ("Fedwire"), by the later of 10:00 a.m. (e.t.) on the business day when payment is due or within two hours after GSCC issues to the member a report detailing the member's funds-only settlement payment obligations. GSCC Rules and Procedures, R. 13 section 5.

[31] Securities Exchange Act Release No. 27901, *supra* note 7.

[32] Pursuant to GSCC's Rules inter-dealer brokers are not required to make or maintain a required clearing fund deposit. Instead, they must deposit and maintain a cash deposit of $100,000, and an additional amount of $1.5 million which may be made in cash or in the form of an open account indebtedness secured by eligible treasury securities or letters of credit. GSCC Rules and Procedures, R. 4 section 7.

[33] *See* Securities Exchange Act Release No. 27006, *supra* note 6 at 29803.

[34] Pursuant to GSCC's Rules, the funds-only settlement amount is determined by calculating, for

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business days.[35] The second component ("anticipated funds-only settlement obligation") is the netting member's funds-only settlement obligation due on the day when the contribution is calculated.[36]

GSCC's proposal revises the first element of the clearing fund formula by eliminating the comparative analysis between the first and the second component. GSCC proposes to eliminate the second component, the netting member's anticipated funds-only settlement obligation, thus basing a participant's funds-only settlement contribution on the first component of the formula, the weighted rolling average, which is 125% of the absolute value of the netting member's average funds-only settlement obligation for the previous 20 business days.

As revised in the Order approving SR–GSCC–89–13, the second element of the clearing fund formula, a member's securities net settlement contribution requirement, is the greater of either, the average offset margin amount for the last 20 business days,[37] or 50% of the gross margin amount.[38] The offset margin amount is calculated by subtracting a credit for offsetting net settlement positions from the gross margin amount of the member's net settlement positions.[39]

GSCC is proposing to revise the second element of the clearing fund formula by requiring that the gross margin amount be calculated by multiplying the appropriate margin factor, not only by a participant's net settlement positions, but also by the dollar value of each forward net settlement position during the position's forward period.[40] In addition, GSCC proposes to calculate the offset margin amount by allowing credits among offsetting forward net settlement positions and between the securities underlying forward and regular net settlement positions. Pursuant to the proposal, GSCC will calculate these credits following the procedure established pursuant to the clearing fund revisions set forth in the Order approving SR–GSCC–89–13.[41]

3. Clearing Fund Deposits and Collateralization of Forward Mark Allocation Payments

Pursuant to GSCC's Rules, clearing fund contributions, like forward mark allocation payments, may be in the form of immediately available funds following the funds-only settlement amount process set forth in GSCC's Rules.[42] Likewise, a participant may make clearing fund contributions in the form of an open account indebtedness or have its required forward mark allocation payment offset, on a dollar-for-dollar basis, by eligible collateral ("forward collateral"). A participant may pledge or deposit unmatured, marketable debt securities in book-entry form that are direct obligations of the United States Government ("eligible treasury securities") [43] and/or eligible letters of credit to secure its clearing fund open account indebtedness or forward mark allocation payment obligation.[44]

Pursuant to the proposal, GSCC will require that forward collateral in the form of eligible treasury securities should be deposited with a depository institution designated by GSCC, at least one hour prior to the deadline for payment of the required forward mark allocation payment, or later if permitted by GSCC. Forward collateral in the form of eligible letters of credit must be available to reduce a netting member's

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a particular business day the net total of the following: (a) Trade adjustment for settling positions, (b) any marks-to-the-market owed for failed positions, and (c) adjustments for coupon, and redemption payments. GSCC Rules and Procedures, R. 13 section 2; Securities Exchange Act Release No. 27006, *supra* note 6 at 29799 (describing) each component of the funds-only settlement amount). The proposed rule change will require GSCC to add the following components to the determination of the funds-only settlement amount: (a) The amount reported to a member during the previous business day's processing cycle as its funds-only settlement amount obligation ("opening balance"), (b) the aggregate settlement amount that a member has either received from or paid to GSCC since the end of the processing cycle immediately prior to the processing cycle during which the funds-only settlement amount .s being calculated ("collected/paid amount"), (c) the total required forward mark allocation payment, and (d) the total forward mark allocation return amount.

[35] GSCC determines this average by placing a greater weight on more recent days within the 20 business days, in accordance with a schedule published from time to time.

[36] Under GSCC's current clearing fund formula calculations, if the second component (the netting member's anticipated funds-only settlement obligation) exceeds, the first component (the netting member's weighted rolling average funds-only settlement obligation) by 25% or more, GSCC will use the second component (the anticipated funds-only settlement obligation) as the funds-only element of the formula to calculate the required clearing fund deposit. Securities Exchange Act Release No. 27006 *supra* note 6 at 29803.

[37] *See supra* note 35 (discussing GSCC's weighted average procedure).

[38] The gross margin amount is the product of the appropriate margin factor multiplied by the total dollar value of the member's daily net settlement positions. GSCC has established a margin factor for each maturity range within each product group. That factor is a percentage, which is generally designed to measure the potential volatility of prices in that maturity range. Securities Exchange Act Release No. 27901 *supra* note 7

[39] *Id.*

[40] GSCC also will multiply the appropriate margin factor times the participant's fail net settlement positions, if any.

[41] For this purpose, GSCC will measure the degree of correlation between the price variation of regular and forward-settling securities (*i.e.*, the extent to which the increased value of a given security tends to be associated with the increased value of another while the decreased value of the same security tends to be associated with a decreased value of the other). GSCC will group forward-settling securities along with securities traded in a regular fashion into "offset classes" according to their remaining time to maturity and their assessed degree of correlation.

GSCC also will establish "disallowance percentages" among those different classes of securities. These are percentages by which GSCC will reduce credits for offsetting positions to protect against the risk that the market price correlation among securities may be imperfect or deviant from historical norms. For a full discussion of the procedure established by GSCC to offset positions, see Securities Exchange Act Release No. 27901, *supra* note 7

[42] *See supra* section II C.1

[43] Eligible treasury securities used to either secure clearing fund obligations or collateralize forward mark allocation payments must have one year or less until their maturity date. In addition, they must be pledged to GSCC and delivered to either GSCC or to a depository institution approved by GSCC. GSCC will value eligible treasury securities at current market value, as determined by GSCC on a daily basis. Eligible treasury securities, however, may be subject to a haircut, as determined by GSCC, based on the type of security and the length of time to maturity date.

[44] GSCC proposal defines eligible letters of credit, for the purpose of collateralizing a participant's clearing fund and forward mark allocation payment obligations, as those that:

Currently, GSCC credits any interest on securities deposited to secure a clearing fund open account indebtedness to the participant's clearing fund cash deposits. GSCC Rules and Procedures, R. 4 section 4. The proposal will require GSCC to credit to the member's required forward mark allocation payment any interest earned on securities deposited as forward collateral. Subject to GSCC's approval, a participant may substitute and or withdraw eligible treasury securities from pledge and deposit if, prior to such action, the participant has taken appropriate steps to maintain its required fund deposit or forward mark allocation payment obligation.

(1) Are issued by a bank or trust company approved by GSCC for such purpose, and must be delivered to either GSCC or to a depository institution designated by GSCC for the purpose of holding them on GSCC's behalf;

(2) Contain the unqualified commitment of the issuer to pay a specified sum of money upon demand at any time prior to their expiration;

(3) Are irrevocable, unless GSCC consents to their revocation or amendment;

(4) State, that they will be duly honored upon presentment to the .ssuing bank, that partial drawings are permitted, and that they are issued under and governed by Article V of the New York Uniform Commercial Code;

(5) Are not issued by the member (or an affiliate of such member) whose obligation is to be collateralized by the letter of credit, and

(6) If accepted, would not result in more than 20% of the letters of credit held by GSCC as collateral for both clearing fund and forward mark allocation payment obligations being issued by the same .nstitution.

In addition, GSCC will deduct 1% of the face value of letters of credit in determining their value as clearing fund and forwards collateral. Eligible letters of credit may not be used to secure a clearing fund open account indebtedness if, as a result, more than 70% of the participant's required fund deposit is secured by letters of credit.

required forward mark allocation payment obligation no later than 48 hours prior to the deadline for making a required forward mark allocation payment,[45] unless otherwise allowed by GSCC.[46]

GSCC will return the forward mark allocation payment on the business day following the day of issuance of the Funds-only Settlement Report that set forth the member's forward mark allocation obligation ("forward mark allocation return amount"). GSCC, however, will return this amount to the extent that the member actually made such payment to GSCC. GSCC will pay the forward mark allocation return amount pursuant to the funds-only settlement amount payment process set forth in its Rules.[47] Upon a member's request, GSCC will return to the member itself or its designated depository institution the forward collateral deposited in the form of either eligible treasury securities or eligible letters of credit. The proposal allows GSCC to return such collateral as soon as it considers it practicable and upon making a determination that, at the time of the return of collateral, the member will have on deposit sufficient funds and/or forward collateral to satisfy its forward mark allocation payment obligation.

4. Proposed Enhancements to GSCC's Ability to Collect Additional Fund Deposits

The proposal amends GSCC's Rule 4 section 9 in order to allow GSCC to collect, on a discretionary basis, additional clearing fund deposits. Currently, GSCC may collect from a participant under surveillance, in addition to the clearing fund deposit amounts, 200% or more of its highest single business day's fund deposit during the most recent 20 business days in order to protect GSCC or other members.[48] The proposed rule change would allow GSCC to collect additional payments or deposits to offset potential risks associated with the member's activity in forward and/or yield comparison trades.

The proposed amendment also would allow GSCC to give notice to a participant when the value of its funds-only settlement amount for that particular day (not including the value of any forward collateral) exceeds by 25% the member's funds-only settlement amount (not including the value of any forward collateral) as used in the clearing fund formula calculation (*i.e.*, averaged over the most recent 20 business days, as weighted to reflect the currentness of such amounts).

Whenever any such notice is made available to a participant before 3:00 p.m. (e.t.), the participant must contribute to the clearing fund, by the close of business of the day when it receives the notice, the difference between that day's funds-only settlement amount and the averaged funds-only settlement amount, as used by GSCC to calculate the participant's clearing fund contribution on that day. If the notice is made available to a participant after 3:00 p.m. (e.t.) the participant must deposit the difference between these two amounts by noon of the following business day.

5. Revisions to the Loss Allocation and Assessment Provisions

Currently, GSCC employs a variety of loss allocation procedures depending on the source and the amount of the loss.[49] GSCC's proposal does not alter the procedure for allocation of loss; instead it incorporates the forward mark allocation amounts to such methods. The proposed rule change allows GSCC to apply a participant's forward mark allocation payments, along with its clearing fund deposits, before looking to other members' fund deposits, to satisfy any loss or liability incurred by GSCC as a result of the member's failure to fulfill its obligation to GSCC.

GSCC may allocate the remaining losses among the other netting members, pursuant to its loss allocation rules.[50] GSCC only will be able to use a member's forward mark allocation payments to satisfy remaining losses or liabilities incurred by GSCC as a result of a member's default. GSCC, however, may not use forward mark allocation payments to satisfy losses either associated with a netting member's default on a required allocation assessment or arising out of events unrelated to a member's failure.

III. GSCC's Rationale

The proposed rule changes will permit GSCC to introduce a procedure for the netting of forward-settling Treasury security trades. GSCC believes that the proposed rule change will promote the prompt and accurate clearance of securities transactions for which GSCC is responsible and is consistent with the requirements of section 17A of the Act.[51]

GSCC believes that, in view of the potential risks to individual Government securities brokers and dealers and to the industry as a whole posed by the nature of forward-settling trading in Government securities and the large volumes involved, it is necessary for GSCC to introduce a comprehensive procedure for the netting of all forward-settling Treasury security trades. According to GSCC, the current absence of protection, including significant

[45] Amendments to raise the face amount of an eligible letter of credit in order to collateralize a forward mark allocation payment obligation must occur, at least, one hour prior to the deadline for making such payment.

[46] GSCC's proposal allows a member to substitute and/or withdraw letters of credit from pledge and deposit, provided the member previously has taken appropriate action to maintain its required clearing fund deposit or forward mark allocation payment obligations. GSCC, however, may decline to permit such substitution or withdrawal within the hour prior to the close of the Fedwire for securities.

[47] A netting member entitled to collect a forward mark allocation return amount will receive funds through the Fedwire by the later of 11:00 a.m. (e.t.) on the business day when such payment is due or three hours after the report listing such obligation is made available to the member. GSCC Rules and Procedures, R. 13 section 5. The forward mark allocation return amount, however, may take the form of a credit against other debit components of the funds-only settlement amount.

[48] GSCC Rules and Procedures, R. 4 section 3.

[49] If GSCC incurs a loss or liability resulting from one or more netting members' failure to fulfill their obligations to GSCC, GSCC will look to those members' clearing fund deposits and other collateral held by GSCC to satisfy the loss. If the value of the defaulting members' deposits and other collateral is insufficient to satisfy the loss, GSCC will allocate the remaining amount of the loss ("remaining loss") among the netting members as follows:

(1) Remaining losses attributable to direct transactions will be allocated to the netting members (except for inter-dealer brokers) who engaged in trading activity with the defaulting member for settlement on the day of default, on a *pro rata* basis, based on the dollar value of the netting member's trading activity with the defaulting member.

(2) 10% of the remaining losses attributable to broked transactions will be allocated to inter-dealer brokers, as a group, regardless of the level of activity each inter-dealer broker had with the defaulting member for settlement on the day of default. This allocation, however, is limited to $1.6 million per broker, per calendar year.

(3) The balance of any remaining losses will be allocated among other netting members on a *pro rata* basis according to the dollar value of each member's trading activity with the defaulting member, through inter-dealer brokers for settlement on the day of default.

Where a netting member defaults on a required allocation assessment or where GSCC suffers a loss arising out of events unrelated to a member failure, GSCC will apply 25% of its retained earnings, or such greater percentage thereof as determined appropriate by GSCC's Board. If such amount is insufficient to satisfy the loss, GSCC will apply up to $50,000 from each netting member's required cash deposit (or, in the case of an inter-dealer broker, the collateral cash deposit required to be maintained by such broker with GSCC) equally among all netting members. If the loss still remains unsatisfied, GSCC will apply the remainder of each netting member's required clearing fund deposit (or, in the case of an inter-dealer broker, of the collateral deposit, including securities and letters of credit maintained by such broker with GSCC) on a *pro rata* basis in accordance with the average daily level of such deposits or collateral over the prior 12 calendar months. GSCC Rules and Procedures, R. 4 section 8.

[50] *Id.*

[51] 15 U.S.C. 78q-1.

reductions in actual movements required to settle trades, marks-to-market, margin collections, and an orderly process for dealing with the failure of a participant (which are provided to the industry by GSCC with regard to regular-way Government securities trades), for a market in which a firm may generate substantial trading positions heightens the possibility of one or more firms incurring sizable losses that could lead to their insolvency.

GSCC believes that this situation presents the potential for significant disruption to the settlement process for the entire Government securities market. GSCC also believes that encompassing all forward-settling Government securities trades within the netting system significantly mitigates this concern in a number of ways:

1. The netting factors for when-issued notes and bonds are extremely high. Therefore, the vast majority of the settlement obligations arising from such trades—along with the risks attendant to such obligations—would be eliminated by the net, and there would be a dramatic decrease in the number of actual movements of securities and cash required.

2. There would be multilateral netting by novation occurring after comparison on each business day after auction day during the forward-setting period. Thus, GSCC would assume responsibility for the settlement of all securities and funds-only settlement arising from net settlement positions in forward-settling securities.

3. GSCC would collect on a daily basis collateral sufficient to ensure an orderly settlement by providing sufficient protection for itself, its members, and the industry in general against the potential default of a member.

4. GSCC's comprehensive loss allocation system would encompass forward-settling trading, thus better ensuring an orderly process for dealing with the potential failure of a participant.

GSCC believes that, in general, its role in the settlement process for the forward-settling market will help ensure that such process will be an orderly one, regardless of then-prevailing market conditions. Thus, according to GSCC, the need to apply, as soon as possible, the protection of its netting operation to forward-settling Government securities trades is compelling, and will provide further incentive for every major participant in the Government securities market to join the netting system.

IV. Discussion

Section 17A(b)(3) (A) and (F) of the Act [52] requires clearing agencies to have rules and be organized in a manner that will give them the capacity to facilitate and promote the prompt and accurate clearance and settlement of securities transactions for which they are responsible. This section of the Act also requires a clearing agency to have the capacity to assure the safeguarding of securities and funds in its custody or control, or for which it is responsible.

The Commission believes that GSCC's proposal meets these statutory requirements. GSCC's proposed comparison and netting system for forward-settling trades will provide effective means of cutting down a member's settlement obligations, thereby offering a significant reduction in risks to the market place. At the same time, GSCC has designed and expanded safeguards in order to limit the inherent exposure associated with the comparison process of forward-settling trades and reduce the financial risk associated with the netting and settlement of such trades. These safeguards include margin requirements in the form of forward mark allocation payments and an increased ability to collect clearing fund deposits.

A. Prompt and Accurate Clearance and Settlement

The proposal revised GSCC's comparison service, clarifying the procedure that allows participant to submit data for forward-settling trades prior to the date of the auction and requiring netting members to submit all forward trades for comparison.[53] For this reason, the Commission believes that the proposed changes affecting the comparison service will allow GSCC to increase the number of trades submitted for comparison. GSCC's proposal also will enhance the matching process by securing an earlier agreement as to the details of trades, that, otherwise, would have to wait up to two weeks until comparison on a price and value basis. The Commission believes that, as such, the proposal will improve the capacity of participants to monitor their exposure, thus reducing unnecessary risks and costs to investors.

The proposed revisions will offer a two step comparison system. First, participants will be able to submit trade data for comparison on a yield basis between the time the auction of Treasury securities is announced until the date of the auction. The second step in the comparison service for forward-settling trades requires participants to submit trade data once the auction of treasury securities has taken place. This step allows GSCC to compare the price and settlement information. The proposal gives participants additional time to resolve andy differences, without increasing the settlement period, thus reducing the possibility of a firm not knowing a trade on settlement date. As a result, the potential for confusion is minimized and certainty of forward trade settlements increased.

Ordinarily, GSCC successfully compares approximately between 92% and 94% of all sides submitted by participants, including forward-settling trade sides.[54] GSCC's rate of successful comparison for forward trades, however, is only between 75% and 85%.[55] The latter rate of successful comparison is significantly lower than GSCC's comparison rate for regular trades because participants are not required to submit forward trades for comparison. In the event such trades are submitted for comparison, moreover, there is no incentive to submit the data on a timely basis because, currently, GSCC does not net a trade unless it is scheduled to settle on the same day it will be netted.

The proposal changes GSCC's procedures by allowing the comparison system to hold successfully compared forward trade data until the auction date, if the data has been compared on a yield basis, or until the day of issuance, if the data has been compared on a price basis. Present procedures allow GSCC to delete trade data on W/I transactions submitted on or before the auction date by the processing cycle during which the data is compared (or the processing cycle after the auction date, if earlier).[56] GSCC's current procedures also require GSCC to delete trade data on W/I transactions submitted after the auction date during the processing cycle when

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[52] 15 U.S.C. 78q–1(b)(3) (A) and (F).

[53] GSCC's Rules require netting members to submit to GSCC, for comparison and netting, all of their netting eligible trades with other netting members. GSCC Rules and Procedures, R. 11 section 3. GSCC's proposal makes forward-settling trades eligible for netting, consequently, netting members engaging in forward-settling transactions will be required to submit their trade data for comparison at GSCC.

[54] *E.g.*, between February 28, 1990 and March 30, 1990, GSCC received 444,447 trade sides for comparison. GSCC's system successfully compared 415,769 sides, that is, 93.55%.

[55] *E.g.*, between February 28, 1990 and March 30, 1990, GSCC participants submitted 41,848 forward trade sides for comparison. GSCC successfully compared 35,458 sides, or, 84.73% of the total amount of sides submitted during this period.

[56] GSCC Rules and Procedures, Pro. II.C. (as drafted prior to the proposed rule changes).

the data is compared (or the processing cycle before the date of issuance for the security, if earlier).[57] Under these procedures, participants have no reason to submit their forward trade data, at least, until the processing cycle prior to the issuance of the security so that the transaction can be netted and settled on the date of issuance like any other transaction.

The Commission believes that GSCC's proposal will encourage prompt participation in the comparison process of forward trades. In particular, making forward trades eligible for netting on a daily basis, will motivate participants to submit promptly their forward trade data for comparison in order to take advantage of the financial protection afforded by the netting system. As a result, it may be expected that GSCC will be able to improve the rate of successful comparison for forward trades.[58] The Commission expects GSCC to continue exploring additional ways to encorage participants to submit their forward trade comparison data on a timely basis. This would assist GSCC to increase the percentage of successfully compared forward trades data. Likewise, GSCC should implement further measures ensuring that participants will make full use of the proposed yield comparison service in order to secure an early agreement regarding the details of trades and increase the certainty of forward-settling trades.

On the day following successful comparison, the proposal will allow GSCC to extend to forward-setting trades the advantages presently enjoyed by participants trading regularly settled transactions. In the Release approving GSCC's netting system, the Commission summarized these benefits as follows:

> First, trade netting will reduce delivery and payment obligations for dealers * * *. [N]etting will reduce both exposure and settlement costs for GSCC members. Second, GSCC's facilities will reduce member exposure to the risk that the party it trades with will be unable to settle that transaction. GSCC will interpose itself between parties to a trade and guarantee settlement.[59]

A netting system is particularly beneficial for high-volume markets, especially where a large number of transactions occur between a relatively small number of participants.[60] During ordinary periods, forward trading among GSCC participants results in about 10% of GSCC's comparison activity,[61] during the refunding cycles,[62] however, this amount can be substantially higher.[63] GSCC's proposal to net forward-settling transactions will be particularly helpful to participants during the cyclical increases in the forward trading activity. As a result of the proposed changes, participants will no longer be required to keep multiple, individual obligations until they can submit them to GSCC for netting. The proposal will allow GSCC participants to enter their transactions daily so that they can be netted regularly, thus reducing the number of forward-settling transactions to one net settlement figure per trading counterpart.[64]

The proposal establishes a continuous ("rolling") net settlement system from auction date until the scheduled settlement date for net settlement positions on forward-settling trades that have been compared among members. As such, all open forward-settling transactions at the end of a day are offset against the next day's trades. Receive and deliver obligations, however, will not be generated until the processing cycle immediately prior to the scheduled settlement date, once the underlying security can be delivered.

The proposed rolling net settlement system for forward-settling transactions allows GSCC to interpose itself between the trading counterparts, thus becoming the counterpart to each compared trade. This process is called novation. The main advantage associated with novation is that it removes the risk from individual trades awaiting settlement.[65] GSCC recognizes, and the Commission agrees, that, in order to be able to take full advantage of this feature, novation should occur as soon as possible after a trade has been compared.[66] For this reason, GSCC's proposal requires GSCC to novate trades the day after their data has been compared, once the corresponding participant's forward net settlement position has been fixed. The Commission believes that by promptly novating trades, GSCC will allow participants to reduce the period of exposure to the risk that its trading counterpart will be unable to settle that transaction, thus increasing the certainty of forward-settling trades.

B. Safeguarding Funds and Securities

The proposal to make forward-settling trades eligible for netting could increase GSCC's financial exposure. By their very nature, forward-settling trades can not be settled, at least, until their date of issuance. GSCC, however will assume the trading counterpart risk on a daily basis from the day following the date of comparison until settlement date. GSCC intends to protect itself from this risk by collecting, on a daily basis, a forward mark allocation payment. In addition, pursuant to the proposal, GSCC will enhance its ability to collect additional clearing fund deposits, on a discretionary basis, whenever deemed necessary to protect GSCC and its members. GSCC, however, is concerned that the proposed forward mark allocation payment along with its ability to collect additional clearing fund deposits will have a negative effect on the market's liquidity. For this reason, GSCC is amending its clearing fund formula in order to base its calculation on a participant's historical pattern of trading activity.

1. Forward Mark Allocation Payment

On a daily basis, GSCC will collect a forward mark allocation payment amount from participants for whose forward trades' aggregate system price, in dollars, for the day when the payment is being calculated, is higher than the aggregate amount of the contract values for the same position (*i.e.*, debit mark amount). GSCC will determine a participant's forward mark allocation

[57] *Id.*

[58] Improving the rate of successful comparison for forward trades will also improve GSCC's overall rate of successful comparison. For example, during the period between February 28, 1990 and March 30, 1990, GSCC's overall rate of successful comparison including forward-settling trades submitted for comparison, was 93.55%. *See supra* note 54. For the same period, however, the rate of successful comparison, not including forward-settling trades was 94.46%.

[59] Securities Exchange Act Release No. 27006, *supra* note 6 at 29808.

[60] Group of Thirty, *Clearance and Settlement Systems in the World's Securities Markets* 37–38 (March 1989).

[61] *E.g.*, between February 28, 1990 and March 30, 1990, 9.42% of all sides submitted for comparison at GSCC involved forward trades.

[62] Refunding is the most important cycle in the Treasury's auction schedule. This cycle involves the issue of three coupons securities (typically, a short note, a long note and a long bond) during the February, May, August and November quarterly cycles. The Treasury usually announces the securities to be auctioned and issued late in the month prior to the auction. The securities are auctioned separately early in the month and the securities are issued on the fifteenth of the same month. Mossavar-Rahmani, Fabozzi, Jones & wolkowitz, *The Cash Market for US Treasury Securities*, in The Handbook of Treasury Securities 19 (F. Fabozzi ed. 1987).

[63] *E.g.*, On February 6, 7 and 8, 1990 the Federal Reserve Bank of New York auctioned a three year note, a ten year note and a thirty year bond as part of the February quarterly refunding cycle. Between February 1, 1990 and February 28, 1990, GSCC received 461,664 sides for comparison. Out of this total, 140,470 sides, or 30.43% involved forward transactions. During the forward period, February 6–15, 1990, the forward trade sides submitted for comparison constituted 42.35% of all trade sides submitted for comparison at GSCC.

[64] *See* Securities Exchange Act Release No. 27006, *supra* note 6 at 29808.

[65] Group of Thirty, *supra* note 60 at 41.

[66] *See id.*

payment obligation by multiplying the debit mark amount by a fraction. This fraction's numerator will consist of the total debit mark of the five largest forward debit mark amounts among all netting members (including inter-dealer brokers) and the denominator will be the total forward debit mark amounts of all netting members (excluding inter-dealer brokers). In order to prevent over or under collateralization, GSCC will limit individual participant's forward mark allocation payments to neither more than 75% nor less than 25% of their corresponding debit mark amounts.

The Commission recognizes that collateral protection requirements, such as the proposed forward mark allocation payments, should be sufficient to provide an adequate level of protection in light of current market conditions, while taking into account the overall risk on an entire position. Collecting a forward mark allocation amount which is substantially lower than a participant's debit mark amount could expose GSCC to significant financial risk if, during the forward period, the prices of the underlying securities rise or fall sharply. At the same time, an excessive forward mark allocation requirement could impose a substantial liquidity burden on participants without corresponding safeguarding benefits. The Commission, therefore, must determine whether the proposed mark allocation payment strikes "a suitable balance between controlling financial exposure * * * and imposing excessive business costs on * * *." GSCC's membership.[67]

GSCC's proposal offers a new approach to the provision of collateral protection, insofar as it is geared toward protecting GSCC against a default by participants holding the largest debit mark amounts. Participant's forward mark allocation payments are limited by a fraction representing the percentage of concentrated (and, in some instances, additional) risk that the five largest forward debit mark amounts represent to the total forward debit mark amounts of netting members, excluding inter-dealer brokers. This yields the amount of a participant's total debit mark amount that is proportionate to the five largest forward debit mark amounts.

The Commission is concerned that GSCC's decision to limit a participant's forward mark allocation payment to no more than 75% of its debit mark amount could result in an amount that may not fully reflect the level of risk that the five largest debit mark positions could represent to GSCC. GSCC believes that the 75% cap will provide GSCC with sufficient collateral in order to protect itself and its members against the financial exposure resulting from a participant's default. On balance, the Commission believes that the proposal does provide GSCC with an adequate level of protection. Upon implementation of this proposal, moreover, GSCC will have the ability to collect additional funds from participants whose trading activity could result in additional risk, thus placing GSCC in a better position to minimize financial exposure to itself and its membership in the event of a sudden price fluctuation in the underlying securities.

The Commission also recognizes that the proposed calculation of the mark allocation payment along with alternate clearing fund collection method will provide GSCC with sufficient liquidity to protect itself and its membership in the event it is forced to liquidate a defaulting participant's position. The Commission, however, continues to express its concern regarding the development of a system that provides collateral protection for forward-settling transactions independently from other liquidity sources desinged for the protection against risks stemming from the settling of regular-way trades. Therefore, during this Order's two year approval period, GSCC should constantly monitor the adequacy of its forward mark allocation payment calculation to ascertain its effectiveness in collateralizing forward-settling obligations for the actual financial risk they might represent to GSCC and its membership. At that time, the Commission will revisit this issue with GSCC.

The basis for the forward mark allocation payment obligation will be the participant's debit mark amount. In order to determine this amount, GSCC will rely, to a great extent, on its calculation of the system prices for the securities underlying the forward settling transactions. In the Order approving GSCC's automated system for assessing market price volatility the Commission noted the current lack of a standard method to determine an accurate closing price for Government securities.[68] Naturally, this is also true for Government securities underlying forward trades. For this reason, in order to determine the system price for these securities, GSCC will have to calculate a weighted average of forward-settled securities data compared for netting.[69]

The Release approving GSCC's automated pricing system restated the Commission's concern, at the time of approval of GSCC's netting system, regarding this manner of calculating a system price. This calculation may not fully reflect the inter-dealer closing price on days when there has been substantial intra-day price volatility.[70] GSCC, however, will have the flexibility to select a price other than the system price.[71] As the Commission previously stated, GSCC should continue to develop its automated pricing system in order to reduce its reliance on discretionary authority while preserving the added flexibility necessary under unusual market conditions.[72] In particular, given the relevancy of the system price in the calculation of a participant's required forward mark allocation payment, GSCC should continue to explore ways to ensure that the automated pricing system will yield a system price that accurately reflects the inter-dealer closing price for forward-settling securities.[73]

2. Proposed Revisions to the Clearing Fund Formula

In the Release announcing standards for the registration of clearing agencies, the Division of Market Regulation counseled individual clearing agencies to "establish by rule an appropriate level of clearing fund contribution based, among other things, on its assessment of the risks to which it is

[67] Securities Exchange Act Release No. 23167 (April 22, 1986), 51 FR 16127, 16131 (April 30, 1986).

[68] Securities Exchange Act Release No. 27901, *supra* note 7 (citing Securities Exchange Act Release No. 27006, *supra* note 6, at 29809).

[69] *See* Securities Exchange Act Release No. 27901, *supra* note 7.

[70] *Id.* (citing Securities Exchange Act Release No. 27006, *supra* note 6, at 29809).

[71] If GSCC does not believe that a system price reflects the inter-dealer closing price, GSCC will continue to collect information from several sources and will compare this information with the system price. In addition, GSCC will screen trades that reflect prices other than inter-dealer prices. If after comparing the system price with the collected price information, GSCC determines that this price does not reflect the inter-dealer closing price, it will choose a price closer to the closing price among Government securities dealers. For a full discussion of this procedure see Securities Exchange Act Release No. 27901, *supra* note 7.

[72] *Id.*

[73] Likewise, the Commission expects GSCC to review its automated system for assessing market price volatility in light of the exigencies of the market for forward-settling securities. In particular, GSCC should ensure that this automated system will provide GSCC with the information necessary to calculate adequate margin intervals and disallowance factors for forward-settling securities. In this regard the discussion and the requirements set forth in Securities Exchange Act Release No. 27901 (approving File No. SR-GSCC-89-13), are made applicable to securities underlying forward-settling transactions.

subject."[74] GSCC is concerned that the current clearing fund formula could result in reduced liquidity for participants. GSCC, therefore, is proposing to amend its clearing fund formula in order to base a participant's clearing fund daily requirement on the participant's daily funds-only settlement amount averaged over the previous 20 business days.

GSCC's proposal makes uncollateralized forward mark allocation payment obligations part of a participant's funds-only settlement amount. Presently, under GSCC's current Rules, this amount would be included in the calculation of the participant's clearing fund requirement. If, as a result of the forward mark allocation payment, the participant's funds-only settlement amount for that day is higher than the 20 business day weighted average, the participant would be required to pay the forward mark allocation amount twice, as forward mark allocation payment, *per se*, and as part of the clearing fund deposit. The Commission agrees with GSCC that collecting the forward mark allocation amount twice would not offer any additional benefits.

A clearing fund should provide a ready source of liquidity as a defense against participants defaults and should serve as a vehicle to facilitate risk mutualization among participants.[75] The Commission believes that, under ordinary market conditions, the proposed clearing fund calculation, along with the proposed forward mark allocation payment obligation, should provide GSCC with sufficient liquidity to meet financial needs in the event of a default by a participant.[76] The Commission, however, expects GSCC to monitor the effects of the proposed revisions on GSCC's ability to collect adequate clearing fund deposit amounts, especially during periods of high volume in the forward-setting securities market.

3. Additional Collection of Fund Deposits

The Commission believes that GSCC's revisions to the clearing fund formula and the required forward mark allocation payment will afford GSCC and its members financial protection during ordinary market conditions.

[74] Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920, 41929 (June 23, 1980) (footnote omitted).

[75] Securities Exchange Act Release No. 27006, *supra* note 6 at 29810.

[76] GSCC's proposal does not alter the structure of its loss allocation procedures. Accordingly, GSCC will be able to use the forward mark allocation amounts to satisfy losses or liabilities incurred by GSCC as a result of a member's default.

GSCC is concerned, and the Commission agrees, with the possibility that, by themselves, these measures might prove to be insufficinet sources of liquidity to offset potential risks associated with a particular member's activity in forward and/or yield comparison trades especially during periods of unusually high volume and volatility.

The proposal, therefore, will allow GSCC to give notice to a participant when the value of its funds-only settlement amount for that particular day (not including the value of any forward collateral) exceeds by 25% the member's funds-only settlement amount (not including the value of any forward collateral) averaged over the most recent 20 business days, as weighted to reflect the currentness of such amounts. This proposal will allow GSCC to acquire additional funds deposits whenever GSCC detects a risk stemming from a participant's higher than usual funds-only settlement activity.

In the concurrently issued Order approving GSCC's revisions to the clearing fund formula, the Commission has approved a similar proposal, allowing GSCC to collect additional contributions, on a discretionary basis, when a participant's deposits to the clearing fund are substantially less than the amount of the clearing fund formula as calculated by taking into account the participant's net settlement obligation for the day when the computation is done. In that Order, the Commission stressed the importance of having available a liquid source of funds ready to meet the liquidity needs of clearing agencies. These funds give book-entry systems access to sources of readily available liquidity that support timely settlement in the event a participant is unable to settle its obligations.[77]

The Commission believes that the proposal to collect additional clearing fund deposits will protect GSCC against potential risks associated with a particular member's activity in forward and/or yield comparison trades whenever GSCC foresees that a participant's required forward mark allocation payment will not be sufficient to prevent financial exposure. At the same time, the proposal will allow GSCC to collect additional clearing fund deposits from participants while preventing excessive clearing fund requirements on a regular basis.

The Commission, however, is concerned with the fact that the proposed additional fund collection will take place only after the risk had been incurred. As a result, a participant's inability to comply with the additional fund deposit requirement could result in a lack of the necessary funding to ensure timely settlement.[78] The Commission, therefore, expects GSCC to explore a manner of assessing clearing fund requirements that will allow it to control a ready and uncommitted source of funds that will, in turn, adequately protect it from contingencies stemming from a participant's daily activities involving forward and/or yield comparison trades and ensure timely settlement of these transactions.

[77] Securities Exchange Act Release No. 27901, *supra* note 7 (citing Staff Federal Reserve System, *Proposals for Modifying the Payments System Risk Reduction Policy* 89 [May 1989]).

C. Establishment of a National System for the Prompt and Accurate Clearance and Settlement of Securities Transactions

The Act requires the Commission to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions ("National System")[79] in order to, not only "bolster sagging investor confidence but also to assure that the country maintains a strong, effective and efficient capital raising and capital allocating system in the years ahead."[80] The Commission believes that GSCC's proposed rule change furthers this statutory objective.

Prior to May 24, 1988, forward-settling transactions were compared and settled individually, among the trading parties, outside a clearing agency environment. On that date, when GSCC was temporarily registered as a clearing agency under section 17A of the Act, the Commission approved GSCC's comparison service for these transactions.[81] Upon approval of this release, GSCC will implement a netting service, thus, finally offering to participants involved in forward-settling transactions the advantages already enjoyed by members trading Government securities settled in a regular fashion. For this reason, the Commission believes that the proposal will encourage settlement of forward-settling transactions among participants in a clearing agency environment. In this regard, as required by the Act, the proposal perfects the mechanisms for the prompt and accurate clearance and

[78] *See* Staff Federal Reserve System, *Proposals for Modifying the Payments System Risk Reduction Policy* 89 (May 1989).

[79] Act section 17A(a)(2), 15 U.S.C. 78q–1(a)(2).

[80] S. Rep. No. 75, 94th Cong., 1st Sess. 3 (1975).

[81] *See* Securities Exchange Act Release No. 25740, *supra* note 5.

settlement of securities in a central clearing system.[82]

In order to be able to net forward-settling transactions and to further encourage submission of these trades to GSCC's clearance and settlement service, GSCC has developed and will implement safeguarding measures to protect funds and securities related to forward-settling transactions. The Commission believes that these measures will bolster the confidence of investors, thus ensuring that the country continues to maintain an efficient capital raising system.

D. Summary

The Commission preliminarily finds that GSCC's proposal is consistent with section 17A of the Act,[83] The Commission believes, however, that, in light of its significance to GSCC and its membership, the proposed netting service for forward-settling transactions should be carefully monitored before it becomes a permanent feature of GSCC's netting system. For this reason, the Commission is temporarily approving the proposed rule filing until April 30, 1992.[84] The Commission, however, expects GSCC to comply with the following undertakings in order to assess the accuracy and efficiency of the proposed rule changes. The data collected in the process of compliance with these conditions will assist the Commission in determining whether the temporarily approved rule changes should become a permanent part of GSCC's Rules and Procedures.

1. GSCC will continue to consider ways to ensure that the automated pricing system will yield a system price that accurately reflects the inter-dealer closing price for forward-settling securities.[85]

2. On a daily basis, GSCC will monitor the adequacy of its forward mark allocation payment calculation to ascertain its effectiveness in collateralizing forward-settling obligations for the actual financial risk they might represent. On a monthly basis, GSCC will report to the Commission the total debit mark amounts associated with participants' forward net settlement positions and the total amount of forward mark allocation payments collected by GSCC as a result of said debit mark amounts.

3. With regard to forward mark allocation payments, GSCC will continue to monitor the implementation of its system to ensure that it provides adequate collateral protection for forward-settling transactions independently from other liquidity sources designed to protect against risks stemming from the settling of regular-way trades.

4. GSCC will continue to monitor, especially during periods of high volume in the forward-settling securities market, the effects of the proposed revisions to its clearing fund formula on its ability to collect clearing fund deposit amounts for the protection against risks associated, not only with forward-settling trades, but also trades settled in a regular fashion. On a monthly basis, GSCC will report to the Commission any situation where GSCC could make a special call for additional clearing fund deposits pursuant to GSCC Rules and Procedures, R. 4 section 9, and the amount assessed, if any.

5. Within 30 days after the August 1990 refunding cycle, GSCC will report to the Commission, with regard to securities underlying forward-settling trades: (a) The average daily closing price, (b) the daily system price, (c) the total number and price frequency of trade prices outside two standard deviations, and (d), on any particular day during the refunding cycle, the identity of participants holding forward-settling positions priced outside two standard deviations and the corresponding total dollar value of such trades.

6. On a daily basis, GSCC will monitor its funding requirements to ensure that the total amount of forward mark allocation payments provide sufficient liquidity, during periods of high volume, such as the quarterly refunding cycles, to protect it from contingencies stemming from participants' daily forward net settlement obligations. On a monthly basis, GSCC will report to the Commission any situation where the total forward mark allocation payment collected for that month is less than the aggregate of the daily five largest forward debit mark that month.

V. Conclusion

It is therefore ordered, pursuant to section 19[b][2] of the Act,[86] that the proposed rule change, SR–GSCC–90–01, be, and hereby is, temporarily approved until April 30, 1992.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. 17 CFR 200.30–[12] (1989).

Jonathan G. Katz,

Secretary.

[FR Doc. 90–9007 Filed 4–19–90; 8:45 am]

BILLING CODE 8010–01–M

[82] Act section 17A[a][3][F], 15 U.S.C. 78q–1[a][3][F].

[83] 15 U.S.C. 78q–1.

[84] The Commission expects GSCC to file for an extension of approval of the proposed rule filing by January 13, 1992.

[85] In addition, in order to be able to better assess market volatility and improve its ability to ascertain price trends, GSCC has committed itself to examine and compare its assessment of price volatility for Government securities netted at GSCC and the level of volatility projected as a result of trading in the derivative markets for the same securities. In addition, GSCC expects to be in a position to report on this comparative analysis on a daily basis.

[86] 15 U.S.C. 78s[b][2].

[Release No. 34–27903; File No. SR–PSE–89–24]

Self-Regulatory Organizations; Pacific Stock Exchange, Inc.; Order Approving Proposed Rule Change Relating to Market Maker Trading Requirements and Obligations

On October 10, 1989, the Pacific Stock Exchange, Inc. ("PSE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to increase the trading requirements and obligations of PSE market makers.

The proposed rule change was published for comment in Securities Exchange Act Release No. 27499 (December 4, 1989), 54 FR 51534 (December 15, 1989). No comments were received on the proposed rule change.[3]

Currently, Exchange rules provide that at least 50% of the trading activity of a market maker must be in classes of option contracts to which his Primary Appointment extends ("Primary Appointment Trading Requirement"). Under current Exchange rules, a Primary Appointment Zone is comprised of arrangements of classes of option contracts which are not necessarily traded at the same post. Exchange rules also provide that 40% of a market maker's tarnsactions must be executed by the market maker in-person while present on the trading floor ("In-person Trading Requirement").

Generally, the proposed rule change will delete Exchange Options Floor Procedure Advices ("OFPAs") B–1, B–3, B–5, and B–9 and incorporate their provisions in Exchange Rule VI, sections

[1] 15 U.S.C. 78s[b][1] [1982].

[2] 17 CFR 240.19b–4 [1989].

[3] The proposal was amended on March 14, 1990 to clarify that, for purposes of determining whether an exemption to Exchange Rule VI, section 75 exists, a registered market maker is considered to be primarily engaged in the business of a floor broker if he acts as a floor broker in at least 51% of his trades, measured in terms of his quarterly contract volume.

75, 79, and 80. In addition, the proposed rule change will increase the trading requirements and obligations of market makers.

First, the Exchange proposes to amend Rule VI, section 75, which governs the Primary Appointment Zones of market makers, by incorporating into the amended rule OFPA B–9 and Commentary .04 of Exchange Rule VI, section 79. The PSE also proposes to amend its rules governing Primary Appointment Zones. Specifically, the PSE proposes to raise from 50% to 75% the amount of market maker trading activity for any quarter year required to be in options classes contained in Primary Appointment Zones.

The proposed rule change also alters the structure of Primary Appointment Zones by organizing the zones according to actual posts on the options trading floor and by requiring that the zones be comprised of posts contiguous to each other. Under the proposal, Appointment Zones will consist of one or two trading posts. In addition, the proposed rule change also provides procedures for the selection of Primary Appointment Zones for newly registered market makers.

The Exchange also proposes to modify section 75 to provide for certain exceptions to the 75% in-zone requirement. In particular, a trade executed by a market maker that was solicited on behalf of an account, other than that of another market maker, will not count for or against the 75% requirement, provided that the trade is clearly announced as solicited in the trading crowd.[4] Finally, the proposal modifies the sanctions imposed for violations of the Primary Appointment Trading Requirement.

Under the proposed sanctions, market makers who violate the Requirement for the first time may be fined an amount which equals $50 for each percentage point their assigned contract volume is under the 75% requirement, multiplied by the number of such trading violations within the previous four calendar quarters. A minimum fine of $250, however, will be levied. Market makers who violate the Requirement for the second time may receive a Letter of Restriction which restricts the market maker to only effecting opening trades in options classes to which his Primary Appointment extends for a two week period (closing transactions may be effected in all options classes). The market maker may also be fined using the formula previously set forth, with a minimum fine of $500 being levied. Market makers who violate the Requirement for a third time may receive a Second Letter of Restriction which restricts the market maker to only effecting closing transactions in all options classes for a two week period. The market maker may also be fined using the formula previously set forth, with a minimum fine of $1,000 being levied. A market maker who commits additional violations may be subject to formal disciplinary action.

Second, the proposed rule change amends Exchange Rule VI, section 79, which addresses the trading obligations of market makers. The primary change to this rule is the incorporation and the alteration of the In-person Trading Requirement, currently delineated in OFPA B–5. The proposed rule will raise from 40% to 60% the amount of a market maker's transactions required to be executed by the market maker in-person, while present on the options trading floor. The requirements set forth in OFPA B–5 which govern the granting of leaves of absences to market makers from the options floor are also incorporated in the amended rule. Further, the proposed rule incorporates requirements currently set forth in OFPA B–3 which gives all market makers supplemental obligations with respect to all securities traded on the options floor. Finally, the proposal modifies the sanctions imposed for violations of the In-person Trading Requirement.

Under the proposed sanctions, market makers who violate the Requirement for the first time may be fined an amount which equals $50 for each percentage point their in-person trading activity is below the 60% requirement, multiplied by the number of such trading violations within the previous four quarters. A minimum fine of $250, however, will be levied. Market makers who violate the Requirement for the second time may receive a Letter of Restriction which requires the market maker to effect all opening transactions in person for a period of two weeks. The market maker may also be fined using the formula previously set forth, with a minimum fine of $500 being levied. Market makers who violate the Requirement for the third time may receive a Second Letter of Restriction which requires that, for a two period, the market maker may only effect opening transactions in issues within his primary appointment and must effect these transactions in person. The market maker may also be fined using the formula previously set forth, with a minimum fine of $1,000 being levied. Any additional violations may result in increased fines and/or restrictions, suspension, or a formal disciplinary action.[5]

Third, the proposed rule change amends Exchange Rule VI, section 80, which places restrictions on a PSE member from acting simultaneously as a market maker and a floor broker. Specifically, the proposed rule incorporates requirements set forth in OFPA B–1 which prohibit a market maker from trading as a flood broker in options covering the same underlying security to which his primary appointment extends.[6]

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, the requirements of section 6. Specifically, the Commission finds that increasing market makers' Primary Appointment and In-person Trading Requirements is consistent with section 6(b)(5) in that it will perfect the mechanism of a free and open market by increasing the depth and liquidity of PSE options markets. Specifically, the Commission believes that increasing market makers' Primary Appointment and In-person Trading Requirements will help to ensure that there in adequate market maker participation in each class of options traded on the Exchange and that public customers receive timely execution of their orders. In addition, the Commission believes that the proposed trading requirements will help to ensure that there is always adequate competition between PSE market makers which, in turn, will contribute to

[4] The proposal also modifies the current exemption from the 75% requirement found in OFPA B–9 regarding market maker trades executed by a floor broker. Currently, those trades executed by a floor broker for a market maker in the market maker's Primary Appointment Zone count neither for nor against the market maker's trading activity. The proposal, however, expands this exception to include all trades effected by floor brokers, regardless of whether the trades are in options within the market maker's Primary Appointment Zone.

[5] In addition, as is currently the case, in order to assure compliance with the spirit and intent of the Requirement, the PSE may review each of the transactions used to meet the In-person Requirement to ensure that a market maker is not effecting numerous single or small-lot trades during limited appearances on the floor of the Exchange only to meet the technical requirements of the In-person Trading Requirement. If such single or small-lot transactions are present, the market maker may be fined an amount which equals $50, for each single or small-lot trade, multiplied by the number of such trading violations within the previous four calendar quarters. The minimum fines and restrictions which are applicable to repeated violations of the In-person Trading Requirement, shall also apply.

[6] Under Exchange Rule VI, section 80, a market maker would still be precluded from acting as market maker and a floor broker, with respect to option contracts covering the same underlying security, on the same business day.

narrower bid-ask spreads and more continuous, deep, and liquid markets for PSE traded options. Moreover, the Commission believes that the PSE proposal is consistent with the obligations of market markers to contribute to the maintenance of fair and orderly markets set forth in Exchange Rule I, section 79 and section 11a of the Act.

The Commission also finds that increasing the sanctions for violations of the Primary Appointment and the In-person Trading Requirements is consistent with section 6(b)(5) in that it increases the likehood of market maker compliance with those requirements. Moreover, the proposed sanctions are reasonably set in relation to the violative conduct.

Finally, the Commission believes that the decision by the PSE to place in an Exchange rule, as opposed to an OFPA, the supplemental obligations of PSE market makers with respect to all securities traded on the options floor, the requirements governing market maker absences from the options floor, and the prohibition against a market maker trading as a floor broker in options covering the same underlying security to which his primary appointment extends, is a proper administrative decision of the PSE and will not alter the substance and effect of these obligations.

It is therefore ordered, Pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (SR–PSE–89–24) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Dated: April 13, 1990.

Jonathan G. Katz,

Secretary.

[FR Doc. 90–9203 Filed 4–19–90; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–27905; File No. SR–NYSE–90–15]

Self-Regulatory Organizations; Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to the Adoption of Listing Standards to NYSE Rules to Permit the Listing of Contingent Value Rights as Set Forth in Paragraph 703.18 of the NYSE Listed Company Manual

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on April 9, 1990, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt paragraph 703.18 of the NYSE Listed Company Manual ("Manual") to provide listing standards applicable to Contingent Value Rights ("CVRs").[1]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below and is set forth in sections A, B and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

(i) The Exchange is proposing to adopt paragraph 703.18 of the Manual to provide listing standards to permit the listing of CVRs which are unsecured obligations of the issuer providing for a possible cash payment at maturity. However, such cash payment, if any, is based upon the price performance of an affiliate's equity security.

At maturity, the holder of a CVR is entitled to a cash payment if the average market price of the related equity security is less than a pre-set taget price. The target price is typically established at the time the CVR is issued. Conversely, should the average market price of the related equity security equal or exceed the target price, the CVR holder is not entitled to any cash payment at maturity.

Under the proposal, only CVRs issued by companies that meet the Exchange's financial listing criteria for size and earnings and that have assets in excess of $100 million would be considered eligible for listing. The Exchange proposes to require minimum public distribution of 600,000 CVRs together with a minimum of 1,200 public holders and an aggregate market value of $18,000,000. In addition, the maturity of the CVRs must be at least one year.

The Exchange also proposes continued listing standards for CVRs which would require a minimum aggregate market value of publicly-held CVRs of $1,000,000. In addition, the Exchange will also give consideration to delisting the CVRs if the related equity security to which cash payment at maturity is tied is delisted.

(ii) Risk disclosure. The Exchange will distribute a Circular to the Membership ("Circular") calling attention to specific risks associated with CVRs. The Circular relating to CVRs emphasizes that CVR investors must be given an explanation of the special characteristics and risks of the CVRs and suggests that transactions in CVRs be recommended only to investors whose accounts have been approved for options trading or after ascertaining that CVRs are suitable for the customer.

(2) Statutory Basis

The proposed rule change is consistent with section 6(b)(5) of the Act in that it is, among other things, designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purpose of this title or the administration of the exchange. Furthermore, the proposed rule change is consistent with section 11A(a)(1)(C)(ii) of the Act in that it will tend to assure fair competition among exchange markets and between exchange markets and markets other than exchange markets.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is no[t]

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[7] 15 U.S.C. 78s(B)(2) (1982).

[8] 17 CFR 200.30–3(a)(12) (1989).

[1] The exact text of the proposed listing standards and the circular to members on CVRs were attached to the rule filing as Exhibits A and B, respectively, and are available at the NYSE and the Commission at the address noted in Item IV below.

necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Comments were neither solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-90-15 and should be submitted by May 11, 1990.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: April 13, 1990.

Jonathan G. Katz,

Secretary.

[FR Doc. 90-9204 Filed 4-19-90; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-17434; 811-1465]

AMA Growth Fund, Inc.; Application for Deregistration

April 13, 1990.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application of Deregistration under Section 8(f) of the Investment Company Act of 1940 ("1940 Act").

Applicant: AMA Growth Fund Inc (previously, Pro Fund, Inc.).

Relevant 1940 Act Sections: Section 8(f) and Rule 8f-1.

Summary of Application: Applicant seeks that the Commission declare by order that Applicant, registered under the 1940 Act as an open-end, diversified, management investment company, has ceased to be an investment company as defined by the 1940 Act.

Filing Date: The application on Form N-8F was filed on March 28, 1990.

Hearing or Notification of Hearing: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 8, 1990, and should be accompanied by proof of service on the Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notifed of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549; Applicant, 5 Sentry Parkway West, Suite 120, P.O. Box 1111, Blue Bell, PA 19422.

FOR FURTHER INFORMATION CONTACT: Brion R. Thompson, Special Counsel, at (202) 272-3016 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231-3282 (in Maryland (301) 258-4300).

Applicant's Representations:

1. Applicant filed a Notification of Registration under the 1940 Act on January 18, 1967. Applicant's initial registration statement was declared effective on September 5, 1967. Applicant is a series company consisting of three separate investment portfolios, the Classic Growth Portfolio, Global Growth Portfolio and Growth plus Income Portfolio (each a "Portfolio" and together, the "Portfolios").

2. On November 20, 1989, the Board of Directors of Applicant took action authorizing an Agreement and Plan of Reorganization (the "Plan") under which all of the assets and liabilities of Applicant would be transferred to the newly created series of the AMA Family of Funds, Inc. ("AMA Family") (previously AMA Income Fund, Inc.), a registered investment company (File No. 811-2475). The required majority of Applicant's shareholders approved the Plan on December 29, 1989.

3. Pursuant to the Plan, on January 1, 1990, Applicant assigned, sold, conveyed, transferred and delivered to the respective new Classic Growth, Global Growth and Growth plus Income series of AMA Family (the "New Funds") all of the assets of the corresponding Portfolios. In consideration, AMA Family assumed on behalf of each New Fund all of the obligations and liabilities of the corresponding Portfolios and delivered to each Portfolio that number of shares of common stock of the corresponding New Fund equal to the number of outstanding shares of the corresponding Portfolio (the "AMA Family New Fund Shares"). Applicant distributed the respective AMA Family New Fund Shares pro rata to the shareholders of the respective Portfolios of record as of December 31, 1989. No brokerage commissions were paid in connection with the Plan.

4. As of October 31, 1989, the record date for determination of shareholders of Applicant entitled to notice of, and to vote, at the Special Meeting of shareholders of Applicant, there were 3,360,536, 4,761,051 and 492,053 shares outstanding of Applicant's Classic Growth, Global Growth and Growth plus Income, respectively, each having an aggregate net asset value of approximately $33,400,000, $106,900,000 and $10,400,000, respectively, and each having a per share net asset value of $9.90, $22.37 and $21.00, respectively. Following implementation of the Plan on January 1, 1990, Applicant had no shareholders.

5. The Plan expenses were allocated among the three Portfolios, the three portfolios of the AMA Money Fund, Inc., an affiliated open-end investment company which was party to a similar agreement and Plan of Reorganization, and the three existing portfolios of the AMA Income Fund, Inc. (prior to its

name change to AMA Family) in proportion to each portfolios respective net assets as of the closing date under the Plan. Applicant's share of the expenses were allocated among its respective Portfolios in proportion to their net assets.

6. Applicant filed an application for an order under sections 17(b) and 17(d) and Rule 17d–1 permitting implementation of the Plan, including the proposed sharing of expenses (File No. 812–7221). An order was issued granting the application. See Investment Company Act Release Nos. 17069 (July 17, 1989) (notice) and 17107 (August 11, 1989) (order).

7. All of Applicant's required N–SAR filings have been made including Applicant's N–SAR for the period ending December 31, 1989, which was filed on February 28, 1990, and Applicant will file its N–SAR for the period ending June 30, 1990.

8. Applicant is not engaged, and does not propose to engage, in any business activities other than those necessary for the winding-up of its affairs. Applicant is not a party to any current or pending litigation or administrative proceeding.

9. Except for the transaction described herein, Applicant has not, within the last 18 months, transferred any of its assets to a separate company or trust, the beneficiaries of which were or are security holders of Applicant.

10. Following Applicant's reorganization as funds of AMA Family, upon receipt of the tax clearance certificate for Applicant from the Commonwealth of Pennsylvania, Articles of Dissolution for the Applicant will be filed with the Commonwealth of Pennsylvania and Applicant's registration as a Pennsylvania corporation will be terminated by the Corporation Bureau, Pennsylvania Department of State, Harrisburg, Pennsylvania, as of the same date.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 90–9202 Filed 4–19–90; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–17429; 811–3309]

AMA Money Fund, Inc.; Application for Deregistration

April 13, 1990.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application of Deregistration under Section 8(f) of the Investment Company Act of 1940 ("1940 Act").

APPLICANT: AMA Money Fund, Inc. (previously, The Money Fund of U.S. Treasury Securities, Inc., and Pro Money Fund, Inc.).

RELEVANT 1940 ACT SECTIONS: Section 8(f) and Rule 8f–1.

SUMMARY OF APPLICATION: Applicant, registered under the 1940 Act as an open-end, diversified, management investment company, seeks an order declaring that it has ceased to be an investment company as defined by the 1940 Act.

FILING DATE: The application on Form N–8F was filed on March 28, 1990.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 8, 1990, and should be accompanied by proof of service on the Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549; Applicant, 5 Sentry Parkway West, Suite 120, P.O. Box 1111, Blue Bell, PA 19422.

FOR FURTHER INFORMATION CONTACT: Brion R. Thompson, Special Counsel, at (202) 272–3016 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231–3282 (in Maryland (301) 258–4300).

Applicant's Representations

1. Applicant filed a Notification of Registration under the 1940 Act on November 4, 1981. Applicant's initial registration statement was declared effective on March 8, 1982. Applicant is a series company consisting of three separate investment portfolios, the Tax-Free Portfolio, Treasury Portfolio and Prime Portfolio (each a "Portfolio" and together, the "Portfolios").

2. On November 20, 1989, the Board of Directors of Applicant took action authorizing an Agreement and Plan of Reorganization (the "Plan") under which all of the assets and liabilities of each Portfolio would be transferred to the newly created series of the AMA Family of Funds, Inc. ("AMA Family") (previously known as AMA Income Fund, Inc.), a registered investment company (File No. 811–2475). The required majority of the shareholders of Applicant's Tax-Free and Prime Portfolios approved the Plan on January 2, 1990. The required majority of the shareholders of Applicant's Treasury Portfolio approved the Plan on January 5, 1990. Pursuant to the Plan, on January 2, 1990, with respect to the Tax-Free and Prime Portfolios, and on January 5, 1990, with respect to the Treasury Portfolio, Applicant assigned, sold, conveyed, transferred and delivered to the respective new Tax-Free, Prime and Treasury series of AMA Family, (the "New Funds") all of the assets of Applicant's corresponding Portfolios. In consideration, AMA Family assumed for each New Fund all of the obligations and liabilities of each corresponding Portfolio and delivered to each Portfolio that number of shares of common stock of the corresponding New Fund equal to the number of shares of the corresponding Portfolio (the "AMA Family New Fund Shares"). Applicant distributed the respective AMA Family New Fund Shares pro rata to its shareholders of record as of January 1, 1990, for the Tax-Free and Prime Portfolios, and January 4, 1990, for the Treasury Portfolio. No brokerage commissions were paid in connection with the Plan.

3. As of October 31, 1989, the record date for determination of shareholders of Applicant entitled to notice of, and to vote at, the Special Meeting of shareholders of Applicant, there were 18,570,721, 117,938,982 and 3,191,888 shares outstanding of Applicant's Treasury, Prime and Tax-Free Portfolios, respectively, each having an aggregate net asset Value of $18,570,721, $117,938,982 and $3,191,888, respectively, and each having a per share net asset value of $1.00. Following implementation of the Plan on January 2, 1990, with respect to the Tax-Free and Prime Portfolios and January 5, 1990, with respect to the Treasury Portfolio, Applicant had no shareholders. Applicant currently has no assets and no liabilities.

4. The Plan expenses were allocated among the three Portfolios, the three portfolios of the AMA Growth Fund, Inc., an affiliated open-end investment

company which was party to a similar agreement and Plan of Reorganization, and the three existing portfolios of the AMA Income Fund, Inc. (prior to its name change to AMA Family) in proportion to each portfolios respective net assets as of the closing date under the Plan. Applicant's share of the expenses were allocated among its respective Portfolios in proportion to their net assets.

5. Applicant filed an application for an order under sections 17(b) and 17(d) and Rule 17d-1 permitting implementation of the Plan, including the proposed sharing of expenses (File No. 812-7221). An order was issued granting the application. *See* Investment Company Act Release Nos. 17069 (July 17, 1989) (notice) and 17107 (August 11, 1989) (order).

6. All of Applicant's required N-SAR filings have been made including Applicant's N-SAR for the period ending December 31, 1989, which Applicant filed on February 28, 1990, and Applicant will file its N-SAR for the period ending June 30, 1990.

7. Applicant is not engaged, and does not propose to engage, in any business activities other than those necessary for the winding-up of its affairs.

8. Except for the transaction described herein, Applicant has not, within the last 18 months, transferred any of its assets to a separate company or trust, the beneficiaries of which were or are security holders of Applicant. Applicant is not a party to any current or pending litigation or administrative proceeding.

9. Articles of Transfer between Applicant and AMA Family, effecting the transfer of assets from Applicant's Tax-Free and Prime Portfolio to AMA Family under Maryland law, filed with the State Department of Assessments and Taxation of Maryland, became effective on January 2, 1990. Similar Articles of Transfer effecting the transfer of assets from Applicant's Treasury Portfolio to AMA Family became effective on January 5, 1990.

10. Following Applicant's reorganization as portfolios of AMA Family, upon receipt of the tax clearance certificate for Applicant from the State of Maryland, Articles of Dissolution for the Applicant will be filed with the State of Maryland and Applicant's registration as a Maryland corporation will be terminated by the Office of the Secretary of State, Baltimore, Maryland, as of the same date.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 90-9155 Filed 4-19-90; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-17423; 812-7309]

April 12, 1990.

Berkshire Partners III, L.P. et al.; Application For Exemption

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 ("1940 Act").

APPLICANT: Berkshire Partners III, L.P., Berkshire Partners III (Retirement Fund), L.P. (individually, a "Fund," and collectively, the "Funds"); Berkshire Managers, L.P. (the "Managing General Partner"); and SB Berkshire Advisers, Inc. (the "Advisory General Partner").

RELEVANT 1940 ACT SECTIONS: Order requested under section 6(c) of the 1940 Act for exemptions from the provisions of Sections 2(a)(19) and 2(a)(3)(D) of such Act.

SUMMARY OF APPLICATION: Applicants seek an order under Section 6(c) of the 1940 Act determining that: (i) The Independent General Partners (as defined below) of each of the Funds are not "interested persons" of such Fund, of the Managing General Partner, and of the Advisory General Partner within the meaning of section 2(a)(19) of the 1940 Act by virtue of being general partners of such Fund; (ii) the Independent General Partners of each Fund will not be deemed to be "interested persons" of such Fund by virtue of their service as Independent General Partners of the other Fund; and (iii) limited partners owning less than 5% of the limited partnership units of a Fund are not "affiliated persons" of that Fund, of any other limited partner, or of any General Partners (as defined below) within the meaning of section 2(a)(3)(D) of the 1940 Act solely by reason of their status as limited partners.

FILING DATE: The application was filed on June 2, 1989, and amended on October 6, 1989, March 16, 1990, and April 6, 1990.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 7, 1990, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. SB Berkshire Advisers, Inc., 1345 Avenue of the Americas, 46th Floor, New York, New York 10105. Other Applicants, One Boston Place, Suite 3425, Boston Massachusetts 02108.

FOR FURTHER INFORMATION CONTACT: Barbara Chretien-Dar, Staff Attorney, at (202) 272-3022, or Stephanie M. Monaco, Branch Chief, at (202) 272-3030 (Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231-3282 (in Maryland (301) 258-4300).

Applicants' Representations

1. The Funds are Delaware limited partnerships, each governed by an Amended and Restated Agreement of Limited Partnership (each individually a "Partnership Agreement"). The Funds have elected to be regulated as business development companies under Section 54 of 1940 Act and, therefore, will be subject to Sections 55 through 65 and those sections of the 1940 Act made applicable to business development companies by Section 59 thereof.

2. The Funds have filed a joint registration statement on Form N-2 under the Securities Act of 1933 with respect to an offering of up to 100,000 units of limited partnership interest (the "Units"). The initial offering price will be $1,000 per Unit, with a maximum aggregate offering price of $100 million. The maximum aggregate offering price may, subject to market conditions, be increased to $200 million by an amendment to the registration statement. The minimum investment is five Units, except that the minimum purchase for Individual Retirement Accounts and Keogh Plans will be two Units. Investors must meet certain suitability requirements. Smith Barney, Harris Upham & Co. Incorporated, a subsidiary of Smith Barney, Inc., will act

as the selling agent for the Units on a best efforts basis.

3. The general partners of the Funds (the "General Partners") will consist of three Independent General Partners (defined to be individuals who are not "interested persons" of such Fund within the meaning of the 1940 Act), the Managing General Partner, and the Advisory General Partner. The Managing General Partner is a registered investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act"). The Managing General Partner is a limited partnership controlled by its general partners—Bradley M. Bloom, J. Christopher Clifford, Russell L. Epker, Carl Ferenbach III and Richard K. Lubin—who also are the general partners of Berkshire Partners, a private investment firm.

4. Under the Partnership Agreements, the Managing General Partner will be responsible for purchasing investments for each Fund. These investments either must be confirmed by the Independent General Partners and the Advisory General Partner as meeting certain guidelines, or otherwise be approved by the Independent General Partners and the Advisory General Partner. The Managing General Partner will also provide certain administrative services to each Fund and be responsible for the admission of additional or assignee limited partners to the Funds. Each Fund considers its relationship with its Managing General Partner, as set forth in and defined by the respective Partnership Agreements, to be an investment advisory arrangement in compliance with the relevant provisions of the 1940 Act.

5. The Advisory General Partner, a Delaware corporation, is a registered investment adviser under the Advisers Act and in such capacity will be responsible for certain investment advisory services. The Advisory General Partner is also a subsidiary of Smith Barney, Inc.

6. The Partnership Agreements provide that there be at least three but no more than nine Independent General Partners and that a majority of the General Partners be Independent General Partners. Under the Partnership Agreements, each Fund is managed solely by its Independent General Partners, except with regard to those specific activities of the Fund for which the Advisory General Partner and the Managing General Partner will be responsible. The Independent General Partners provide overall guidance and supervision of Fund operations and perform the same functions as directors of a corporation. The Independent General Partners will assume the responsibilities and obligations imposed by the 1940 Act and the regulations thereunder on non-interested directors of an incorporated registered investment company.

7. The Partnership Agreements provide that Independent General Partners may be removed either (a) for cause by the written vote of two-thirds of the remaining Independent General Partners; (b) by failure to be re-elected by the limited partners at a meeting called therefor; or (c) by majority vote of the limited partners. The Managing General Partner and the Advisory General Partner may be removed either (a) for cause by the written vote of a majority of the Independent General Partners; (b) by failure to be re-elected by the limited partners at a meeting called therefor; or (c) by majority vote of the limited partners. Finally each Partnership Agreement will provide that if at any time the number of Independent General Partners is less than a majority of the General Partners, the General Partners shall appoint and admit such number of Independent General Partners as shall be necessary to constitute a majority. In the event that no Independent General Partner remains, the Managing General Partner will perform the duties of an Independent General Partner to the extent permitted by the 1940 Act and, within 90 days, will call a special meeting of limited partners for the purpose of electing and admitting Independent General Partners.

8. The limited partners have no right to control the Funds' business, but may exercise certain rights and powers of a limited partner under the respective Partnership Agreements. Under the Partnership Agreements, limited partners are afforded certain voting rights, including the election or removal of a General Partner, approval or termination of management arrangements, approval of the sale of all or substantially all of the respective Fund's assets, and amendments to the respective Partnership Agreements. It is the opinion of counsel to the Funds that the existence of these voting rights does not subject the limited partners to liability as general partners under Delaware law.

9. The Partnership Agreements will provide that the Advisory General Partner and the Managing General Partner will not withdraw or resign from the Funds unless a successor Advisory or Managing General Partner, as the case may be, has been appointed and consented to by the limited partners. The Advisory General Partner and the Managing General Partner may resign or withdraw only upon compliance with the following procedures: (a) the Advisory General Partner or the Managing General Partner, as the case may be, must give at least 60 days notice to all partners and designate a successor; (b) the proposed Advisory or Managing General Partner must represent that it is experienced in performing functions that the Advisory General Partner or Managing General Partner is required to perform under the Partnership Agreement and that it will assume all the duties and responsibilities thereunder without receiving additional compensation; and (c) a majority in interest of the limited partners must consent to any successor.

10. The Managing General Partner will receive as compensation certain advisory fees and a yearly fee of $50,000 for administrative services. Under an advisory agreement, the Managing General Partner will receive an annual fee of 1.2% of each Fund's assets under management for the first three years and thereafter a fee of 1.2% of the cost basis of securities held by a Fund. Such fees are subject to reductions if certain other fees, such as break-up fees, commitment fees, or investment banking fees, are paid to affiliates of the Managing General Partner. In addition, the Partnership Agreement provides for distributions, on a cumulative basis, to the Managing General Partner and the Advisory General Partner of income and capital gains in proportion to their relative capital contributions and of incentive distributions of up to 20% of cumulative income and net realized capital gains. The incentive distributions will be paid 90% to the Managing General Partner and 10% to the Advisory General Partner, subject to repayment under certain conditions further described in the application.

11. Insurance policies which would provide coverage to persons who become limited partners in the Funds have not been obtained as of the filing date of the application because (a) the Funds have been advised by counsel that Units in the Funds will constitute valid limited partnership interests in the Funds and that subscribers to the Units will be limited partners of the Funds entitled to all of the benefits of limited partners under the Partnership Agreement and Delaware law; (b) based upon the nature of the business to be conducted by the Funds, the Funds submit that the risk of liability for actions against the limited partners, including actions based upon contract or tort claims, is remote; and (c) the Partnership Agreements will obligate the General Partners of the Funds to

take all action which may be necessary or appropriate to protect the limited liability of the limited partners. The Funds will review periodically the appropriateness of obtaininq an errors and omissions insurance policy for the Funds.

Applicants' Legal Analysis

12. Applicants request an order pursuant to section 6(c) of the 1940 Act determining that (a) the Independent General Partners of each Fund are not "interested persons" of such Fund, of the Managing General Partner, or of the Advisory General Partner within the meaning of Section 2(a)(19) of the 1940 Act by virtue of being general partners of the Fund; and (b) the Independent General Partners of each Fund will not be deemed to be "interested persons" of such Fund by virtue of their service as Independent General Partners of the other Fund.

13. Applicants believe that service by the same individuals as Independent General Partners to each of the Funds, a relationship similar to one where an individual acts as a director to multiple investment companies in the same complex, will be beneficial to each of the Funds. The Funds have been structured so that the Independent General Partners are the functional equivalents of the disinterested directors of an incorporated registered investment company. Section 2(a)(19) excepts from the definition of "interested person" of an investment company those individuals who would be "interested persons" solely because they are directors of the investment company; there exists no equivalent exception for partners or copartners of an investment company organized as a limited partnership.

14. Applicants request further that any limited partner owning less than 5% of the Units of a Fund not be deemed an "affiliated person" of such Fund, of any other limited partner, or of any General Partners within the meaning of section 2(a)(3)(D) of the 1940 Act merely because such limited partner is a partner of a Fund or a co-partner with any other such partner. Since limited partners have no exclusion under the 1940 Act comparable to that provided under section 2(a)(3) to corporate shareholders with less than a 5% ownership interest, the requested relief will place investments in the Funds on a footing more equal with investments in business development companies organized as corporations.

15. Applicants submit that the request for an order exempting the Independent General Partners of each Fund from the provisions of section 2(a)(19) and certain limited partners from the provisions of section 2(a)(3)(D) of the 1940 Act is consistent with the provisions, policies and purposes of such Act.

Applicants' Conditions

If the requested order is granted, Applicants agree to the following conditions:

1. The Funds will be structured so that the General Partners, other than the Managing General Partner and the Advisory General Partner, are natural persons. None of the Independent General Partners of a Fund will be "interested persons" of such Fund.

2. The Funds will be structured so that the Independent General Partners will assume the responsibilities and obligations imposed by the l940 Act and the regulations thereunder on directors or general partners of a business development company. The Independent General Partners will assume the responsibilities and obligations imposed by the 1940 Act and the regulations thereunder on directors and general partners who are not "interested persons" of a business development company.

3. The Partnership Agreements will provide that the Managing General Partner may not resign or withdraw unless a successor Managing General Partner has been appointed in accordance with the Partnership Agreement and the provisions of Sections 15(a), 15(c) and 15(f) of the 1940 Act.

4. The Partnership Agreements will provide the limited partners of each Fund with all of the voting rights required by the 1940 Act. The Funds will obtain an opinion of counsel that such voting rights do not subject the limited partners to liability as general partners under Delaware law. If a limited partner transfers his Units in a Fund in a manner which is effective under the Partnership Agreement, the General Partners of the Fund will promptly take all necessary actions to ensure that such transferee or successor becomes a substituted limited partner.

5. The Funds will obtain an opinion of counsel that the distributions and allocations provided for in each Partnership Agreement are permissible under Section 205 of the Advisers Act and Section 15(a) of the 1940 Act. Except to the extent that the Partnership Agreements allocate income, gain, and loss pro rata to all partners in proportion to their capital contributions, the Managing General Partner, the Advisory General Partner, and any other investment advisers to the Funds will not receive or be allocated any portion of capital gains or capital appreciation, if, as a result, cumulative allocations or payments of capital gains or capital appreciation to such persons would exceed 20% of cumulative realized capital gains, net of realized capital losses and unrealized capital depreciation.

6. The Funds will obtain an opinion of counsel that the current structure of the Funds entitle them to be classified and taxed as partnerships for federal tax purposes.

7. Under the Partnership Agreements, each of the Funds will be authorized to make in-kind distributions of its portfolio securities to its partners upon liquidation of a Fund. However, each Fund agrees not to make any in-kind distributions of portfolio securities to their respective partners until it has obtained either a no-action letter from the staff of the SEC confirming the Fund's interpretation of Section 205 of the Advisers Act (*i.e.*, that unrealized gains or losses attributable to securities distributed in-kind to partners are properly deemed realized upon such distribution), or in the alternative, an order under Section 206A of the Advisers Act, permitting the Fund to deem such gains or losses to be realized upon in-kind distributions.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 90-9156 Filed 4-19-90; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-17430; 811-4004]

Emerging Medical Technology Fund, Inc.; Notice of Application for Deregistration

April 13, 1990.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application of Deregistration under section 8(f) of the Investment Company Act of 1940 ("l940 Act").

APPLICANT: Emerging Medical Technology Fund, Inc.

RELEVANT 1940 ACT SECTIONS: Section 8(f) and Rule 8f-1.

SUMMARY OF APPLICATION: Applicant, a registered open-end, diversified, management investment company, seeks an order declaring that it has ceased to be an investment company as defined by the 1940 Act.

FILING DATE: The application on Form N-8F was filed on March 28, 1990.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 8, 1990, and should be accompanied by proof of service on the Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549; Applicant, 5 Sentry Parkway West, Suite 120, P.O. Box 1111, Blue Bell, PA 19422.

FOR FURTHER INFORMATION CONTACT: Brion Thompson, Special Counsel, at (202) 272-3016 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231-3282 (in Maryland (301) 258-4300).

Applicant's Representations

1. Applicant filed a Notification of Registration under the 1940 Act on April 11, 1984, as a closed-end investment company. Applicant's initial registration statement was declared effective on August 4, 1984. Applicant filed a registration statement on Form N-1A changing its status from a closed-end to an open-end investment company on September 25, 1987, which was declared effective on December 1, 1987.

2. On June 27, 1989, the Board of Directors of Applicant took action in compliance with Rule 17a-8 under the 1940 Act authorizing an Agreement and Plan of Reorganization (the "Plan") under which all of the assets and liabilities of Applicant would be transferred to G.T. Investment Funds, Inc. ("G.T. Investment"), a registered investment company, on behalf of G.T. Global Health Care Fund ("G.T. Fund"), a series of G.T. Investment, (File No. 811-05426). The required majority of Applicant's shareholders approved the Plan on October 26, 1989.

3. Pursuant to the Plan, on October 30, 1989, Applicant assigned, sold, conveyed, transferred and delivered to the G.T. Fund all of its assets. In consideration, the G.T. Fund assumed all of the obligations and liabilities of Applicant and delivered to Applicant a number of full and fractional shares of common stock of the G.T. Fund (the "G.T. Fund Shares"). Applicant distributed in complete liquidation pro rata to its shareholders of record as of October 30, 1989, the G.T. Fund Shares. No brokerage commissions were paid in connection with the Plan.

4. As of August 18, 1989, the record date for determination of shareholders of Applicant entitled to notice of, and to vote at, the Special Meeting of shareholders of Applicant, Applicant had 366,748 shares of beneficial interest outstanding, having an aggregate net asset value of $5,424,203 and a per share net asset value of $14.79. Following implementation of the Plan on October 30, 1989, Applicant had no shareholders.

5. Applicant and GT Fund each paid its own expenses for the reorganization and Plan. Applicant currently has no assets and no liabilities.

6. Applicant is not engaged, and does not propose to engage, in any business activities other than those necessary for the winding-up of its affairs. Applicant is not a party to any current or pending litigation or administrative proceeding. All of Applicant's required N-SAR filings have been made and Applicant will file its N-SAR for the period ending May 31, 1990.

7. Except for the transaction described herein, Applicant has not, within the last 18 months, transferred any of its assets to a separate company or trust, the beneficiaries of which were or are security holders of Applicant.

8. Articles of Transfer between Applicant and G.T. Investment on behalf of the G.T. Fund, effecting the transfer of assets from Applicant to the G.T. Fund under Maryland law, were filed with the State Department of Assessments and Taxation of Maryland on October 30, 1989.

9. Following Applicant's reorganization as a portfolio of the G.T. Fund, upon receipt of the tax clearance certificate for Applicant from the State of Maryland, Articles of Dissolution for the Applicant will be filed with the State of Maryland and Applicant's registration as a Maryland corporation will be terminated by the Office of the Secretary of State, Baltimore, Maryland, as of the same date.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan Katz,

Secretary.

[FR Doc. 90-9157 Filed 4-19-90; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-17431; File No. 812-7430]

First Variable Life Insurance Company, *et al.*

April 13, 1990.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Order under the Investment Company Act of 1940 ("1940 Act").

APPLICANTS: First Variable Life Insurance Company ("First Variable"), Fund BE of First Variable Life Insurance Company ("Fund BE"), Fund E of First Variable Life Insurance Company ("Fund E"), and Monarch Financial Services, Inc. ("MFSI").

RELEVANT 1940 ACT SECTIONS: Exemption requested under section 17(b) from section 17(a) and approval requested under section 26(b).

SUMMARY OF APPLICATION: Applicants seek an order (1) permitting the transfer of accumulation value under certain variable annuity contracts issued through Fund BE to Fund E, and (2) approving the substitution of shares of the Variable Investors Series Trust for shares of the Benham Variable Insurance Series Trust.

FILING DATE: The application was filed on November 16, 1989 and amended on March 30, 1990.

HEARING OR NOTIFICATION OF HEARING: If no hearing is ordered the application will be granted. Any interested person may request a hearing on the application or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m. on May 8, 1990 Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicants with the request, either personally or by mail, and also send a copy to the Secretary of the SEC, along with proof of service by affidavit or, in the case of an attorney-at-law, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street, N.W., Washington, DC 20549. Applicants, First Variable Life Insurance Company, 361 Whitney Avenue, Holyoke, Massachusetts, 01141.

FOR FURTHER INFORMATION CONTACT: Michael V. Wible, Staff Attorney, at (202) 272-2026, or Heidi Stam, Special Counsel, at (202) 272-2060 (Division of Investment Management).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the

SEC's commercial copier (800) 231-3282 (in Maryland (301) 253-4300).

Applicants' Representations:

1. First Variable is a stock life insurance company organized under Arkansas law. First Variable is an affiliate of Monarch Life Insurance Company. First Variable established Fund BE as a separate investment account on July 15, 1988 to fund certain variable annuity contracts. Fund BE is organized and registered under the 1940 Act as a unit investment trust and consists of five investment divisions, each of which invests in a corresponding series of the Benham Variable Insurance Series Trust (the "Benham Trust"). Approximately sixty-nine variable annuity contracts (the "Benham Policies") have been issued through Fund BE.

2. The Benham Policies have been issued in two forms: a flexible purchase payment deferred annuity and a flexible purchase payment immediate annuity. Purchase payments and accumulation value under the Benham Policies may be allocated among up to five investment divisions of Fund BE, plus the fixed account option offered by First Variable. Under current rules, contractowners may change the allocation of their accumulation value up to five times each policy year, subject to a $10 processing fee for each change made under a deferred annuity (no charge is assessed for the first five allocation changes under the immediate annuity); additional allocation changes may be made for owners of deferred annuities only, subject to a $25 charge for each allocation change after the fifth. A contingent deferred sales load is deducted from a deferred annuity's accumulation value upon total withdrawal and upon annuitization. A contingent deferred sales load also may be assessed in the case of certain partial withdrawals.

3. First Variable established Fund E as a separate investment account on December 4, 1979 to fund certain variable annuity contracts. Fund E is organized and registered under the 1940 Act as a unit investment trust and consists of thirteen investment divisions, of which eleven currently invest in a corresponding portfolio of Variable Investors Series Trust ("VIST"). The only policies currently being issued through Fund E are certain flexible purchase payment deferred variable annuity policies and flexible purchase payment immediate variable annuity policies (the "E Policies") which are virtually identical to the Benham Policies in terms of their design except that the underlying investment vehicles differ. The E Policies have been enhanced to allow twelve allocation changes each policy year, without the imposition of any charge, and to waive the processing fee and reduce the withdrawal charge on certain partial withdrawals.

4. The Variable Annuity Sales Corporation ("VASCO") acted as the principal underwriter for Fund BE at the time the Benham Policies were issued. On January 31, 1990, VASCO merged with MFSI, which survived the merger and succeeded to all the rights and obligations of VASCO. As a result, MFSI became the principal underwriter for Fund BE and for Fund E. VASCO entered into distribution agreements with Benham Distributors, Inc. ("Benham Distributors") during 1988 for the distribution of the Benham Policies. By April 1989, Benham Distributors ceased distribution of the Benham Policies. No other broker-dealer is currently distributing Benham Policies.

5. The Benham Trust is registered under the 1940 Act as an open-end management investment company of the series type. The Benham Trust offers its shares to corresponding divisions of Fund BE. The Benham Trust has eight portfolios, five of which are available through Fund BE: the U.S. Government and High Quality Money Market Portfolio; the U.S. Government and High Quality Income Portfolio; the Equity Index Portfolio; the Asset Allocation Portfolio; and the Natural Resources Portfolio. The Benham Trust also has three U.S. Government Zero-Coupon Portfolios, which are not available for investment under the Benham Policies. Benham Management Corporation ("BMC") is the investment adviser to the Benham Trust. BMC is an affiliate of Benham Distributors. Wells Fargo Investment Advisors serves as sub-investment adviser to one of the Benham Trust's portfolios and State Street Bank and Trust Company serves as sub-investment adviser to two of the portfolios. Neither First Variable nor Fund BE are affiliates of Benham Distributors, BMC, the Benham Trust, or either of the sub-advisers.

6. VIST is registered under the Act as an open-end management investment company of the series type. VIST offers its shares to corresponding divisions of Fund E. VIST has 11 portfolios: Cash Management Portfolio, U.S. Government Bond Portfolio, High Income Bond Portfolio, World Bond Portfolio, Equity Income Portfolio, Common Stock Portfolio, Aggressive Growth Portfolio, World Equity Portfolio, Real Estate Investment Portfolio, Natural Resources Portfolio and Multiple Strategies Portfolio. VIST has also authorized the establishment of two U.S. Government Zero-Coupon Portfolios but has not implemented these portfolios.

7. On May 12, 1989, upon BMC's recommendation, the trustees of the Benham Trust determined that the Benham Trust should discontinue offering shares of its portfolios to the extent practicable and that the Benham Trust should be terminated in due course. In making this decision, the trustees considered several factors, including asset growth substantially below expectations, notification by a sub-investment adviser of the Benham Trust that it was not willing to serve as a sub-adviser at current asset levels absent a substantial increase in its fee, and the lack of assurance that BMC or the sub-advisers to the Benham Trust would have economic incentive to continue to serve in their current capacities for the Benham Trust. The trustees then notified First Variable of their determination. Written notice was also provided to contractowners.

8. In view of these events, First Variable must provide a replacement investment vehicle for Fund BE. First Variable proposes to replace the Benham Trust with VIST. First Variable intends to effect this replacement by transferring contractowner accumulation value from Fund BE to Fund E as of the close of business on a date to be selected later (the "Transfer Date"). Contractowners will be given the opportunity to designate their allocations among Fund E divisions to be effected on the Transfer Date, without the allocation being treated as an allocation change for purposes of charges or limits imposed on allocation changes under the Benham Policies. In addition, contractowners will be notified before the Transfer Date that their Benham Policies will be enhanced as of the Transfer Date to allow twelve free allocation changes each policy year, as well as to reflect the other enhancements to the E Policies described in the application. In the absence of contractowner reallocation instructions for the Transfer Date, Applicants will transfer contractowner accumulation value in divisions of Fund BE invested in portfolios of the Benham Trust to the divisions of Fund E invested in the VIST Portfolios as follows:

Benham Trust portfolio	VIST portfolio
U.S. Government and high quality money market portfolio.	Cash management portfolio.
U.S. Government and high quality income portfolio.	U.S. Government bond portfolio.

Benham Trust portfolio	VIST portfolio
Equity index portfolio	Common stock portfolio.
Asset allocation portfolio	Multiple strategies portfolio.
Natural resources portfolio.	Natural resources portfolio.

In due course, First Variable will deregister Fund BE.

9. All contractowners will be notified of the proposed transfer through a new prospectus for Fund BE. The new prospectus will also inform contractowners that they will have the opportunity to designate their accumulation value allocations among Fund E divisions and will specify the Fund E divisions to which Applicants will transfer contractowner accumulation value in the absence of contractowner instructions.

10. The transfer will take place at simple relative net asset value with no change in the amount of any contractowner's cash value or in the dollar value of his or her investment in a variable account or underlying portfolio. No charges or fees will be assessed against contractowners in connection with the transfer, nor will the contractowners bear any of the expenses of the transfer. In addition, neither the contractowners' rights nor First Variable's obligations under the Benham Policies will be altered in any way. Also, the transfer will impose no federal income tax liability on contractowners.

11. Fund BE and Fund E may be deemed to be under the common control of First Variable and, therefore, affiliates. As a result, the transfer of accumulation value from Fund BE to Fund E may be deemed to be a purchase or sale transaction between an investment company and an affiliated person. Therefore, Applicants request that the Commission issue an order pursuant to Section 17(b) of the Act to the extent necessary to exempt from Section 17(a) of the Act the proposed transfer of contractowner accumulation value from Fund BE to Fund E.

12. Applicants represent that the terms of the proposed transfer, including the consideration to be paid or received, are reasonable and fair. Applicants assert that the investment objectives, policies, restrictions and portfolios of the corresponding divisions of Fund BE and Fund E will be compatible; the transfer will be effected at the relative net asset values of the divisions involved in conformity with Section 22(c) of the 1940 Act and Rule 22c-1 thereunder; and neither Fund BE or Fund E nor their contractowners will bear any of the direct or indirect costs of the transaction. Moreover, there will be no dilution in values under policies issued by Fund BE or Fund E.

13. Applicants also assert that the transfer does not involve overreaching on the part of any person concerned. The purpose of the transfer is to replace the Benham Trust with a new investment vehicle and to aggregate the Benham Policies with other like policies currently investing in that investment vehicle. This aggregation will allow for administrative efficiencies and cost savings on First Variable's part, contractowner participation in a sizable separate account with further growth potential, and possible enhancement of the Benham Policies as E Policies are enhanced.

14. Applicants represent that the proposed transfer is consistent with the investment policies of the variable accounts, and that the possibility of transfers such as the transfer here proposed was disclosed in registration statements for the Benham Policies, the E Policies, Fund BE, and Fund E. Applicants further represent that the proposed transfer is consistent with the purposes and policies of the Act.

15. Applicants request that the Commission issue an order pursuant to Section 26(b) of the Act to the extent necessary to approve the substitution of shares of eight designated VIST Portfolios for shares of the eight portfolios of the Benham Trust. This substitution may be deemed to occur as a result of the transfer of contractowner accumulation value, for which Applicants have not received Transfer Date reallocation instructions, from Fund BE to divisions of Fund E investing in the designated VIST portfolios.

16. The Benham Policies reserve to First Variable the right to substitute shares of another investment company for shares of any investment company held by a division of Fund BE and to add, eliminate, or combine one or more divisions. The prospectuses for Fund BE have clearly disclosed this under the caption "Substitution of Trust Shares." First Variable reserved this right of substitution and combination to protect itself and its contractowners in precisely the type of circumstances it faces now: unilateral election (for any reason) to cease operations by a management investment company in which Fund BE invests.

17. Applicants submit that the investment objectives of the VIST portfolios make them suitable and appropriate as investment vehicles for contractowners currently invested in the Benham Trust. The U.S. Government and High Quality Money Market Portfolio of the Benham Trust has investment objectives that are substantially identical to its VIST substitute. The U.S. Government and High Quality Income Portfolio of the Benham Trust and the U.S. Government Bond Portfolio of VIST share very similar investment objectives. The Equity Index, Asset Allocation, and Natural Resources portfolios have investment objectives that are compatible with those of their proposed VIST portfolio substitutes, and pursue their objectives by investing in the same general types of securities as those invested in by their VIST portfolio substitutes.

18. A comparison of the 1989 expense ratios before and after reimbursement of expenses for the Benham Trust and VIST is shown below:

1989 EXPENSE RATIOS

Benham Trust portfolio	Before reimbursement (percent)	After reimbursement (percent)
U.S. Government and high quality money market	2.78	.75
U.S. Government and high quality income	7.45	.75
Equity index	8.14	.75
Asset allocation	2.51	.75
Natural resources	14.72	.75

1989 EXPENSE RATIOS

Visit portfolio	Before reimbursement	After reimbursement (percent)
Cash management	1.31	.75
U.S. Government bond	1.34	.85
Common stock	1.24	.95
Multiple strategies	1.41	.95
Natural resources	3.42	.95

19. The investment adviser for VIST has further agreed to voluntarily reduce its compensation for each of the five VIST portfolios listed above and, if necessary, to pay certain expenses of each VIST portfolio, for the period from January 1, 1990 to May 1, 1991 to the extent that total expenses of a portfolio, other than the investment adviser's compensation, exceed the annual rate of 0.25% of the portfolio's average net assets (0.20% in the case of the U.S. Government Zero-Coupon Portfolios of VIST). The effect of this obligation would be to limit ordinary operating expenses, including the investment adviser's compensation, as a percentage of a portfolio's average daily net assets,

to .75% for the Cash Management Portfolio, .85% for the U.S. Government Bond Portfolio and .95% for the Common Stock, Natural Resources and Multiple Strategies Portfolios.

20. The 1988 and 1989 expense ratios after reimbursement for the VIST Portfolios, excluding the Cash Management Portfolio in 1989, were somewhat in excess of the expense ratios after reimbursement for their Benham Trust counterparts. Applicants represent, however, that if the expense reimbursement arrangements are not taken into account, expense ratios for the Benham Trust Portfolios are, in each case, significantly higher than expense ratios before reimbursement for the corresponding VIST portfolios. Additionally, Applicants represent that there is no assurance that the reimbursement arrangements for the Benham Trust can be maintained at the current or anticipated expense levels, or that BMC or any investment sub-adviser to the Benham Trust would continue to have economic incentive to continue to serve in their current capacities to the Benham Trust. One of the sub-advisers informed the Benham Trust that it would not continue its services absent a substantial increase in fees. Any increase in the advisory fees for the Benham Trust or any termination by BMC of its investment advisory agreement with the Benham Trust would cause an automatic termination of the existing reimbursement arrangements for the Benham Trust. Thus, while the reimbursement arrangements for the Benham Trust might appear to be more favorable to shareholders than those for VIST, these arrangements are not likely to continue. In contrast, there is no imminent threat that the investment adviser for VIST will terminate its services to VIST or that the existing advisory compensation arrangement for VIST will be inadequate. In fact, VIST has just renewed a voluntary reimbursement obligation, evidencing its intentions regarding the continued operation of VIST.

21. In further support of the proposed substitution, Applicants assert that contractowners may exercise their own judgment as to the most appropriate type of investment portfolio option. Contractowners will be given the opportunity to determine the allocation of their accumulation value among Fund E divisions, and Applicants are seeking relief for the substitution only to the extent contractowners choose not to designate their reallocations as of the Transfer Date. In addition, at any time after the Transfer Date contractowners may reallocate their accumulation value among Fund E divisions. Moreover, the VIST portfolios offer an additional six portfolios, thereby providing a wider choice of investment options than has been available in the Benham Trust.

22. Applicants submit that the proposed substitution will not result in the type of costly forced redemption which section 26(b) was intended to guard against. No additional sales load will be deducted beyond those already provided for in the Benham Policies, and the substitution will be effected at relative net asset value without the imposition of any transfer fee or other charges. Moreover, none of the expenses incurred in connection with the proposed substitution, including legal, accounting and other fees and expenses, will be borne by Fund BE or contractowners. In addition, the proposed substitution will not impose any federal income tax liability on contractowners.

23. For all the reasons stated above, the proposed transfer and substatution are consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 90-9158 Filed 4-19-90; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-17424; 812-7232]

The Korea Fund, Inc., et al.; Notice of Application

April 13, 1990.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 ("Act").

APPLICANTS: The Korea Fund, Inc., AARP Growth Trust, The Brazil Fund, Inc., Scudder Development Fund, Scudder Equity Trust, Scudder Funds Trust, Scudder Global Fund, Inc., Scudder Growth and Income Fund, Scudder Income Fund, Scudder International Fund, Inc., Scudder Mutual Funds, Inc., Scudder New Asia Fund, Inc., Scudder New Europe Fund, Inc., and Scudder Variable Life Investment Fund, on behalf of themselves and any other registered investment company or series thereof for which Scudder, Stevens & Clark, Inc. ("SSC"), Scudder Fund Distributors, Inc., or an affiliate thereof acts as investment adviser or principal underwriter.

RELEVANT ACT SECTIONS: Exemption requested under section 6(c) from the provisions of section 12(d)(3) and Rule 12d3-1.

SUMMARY OF APPLICATION: Applicants seek a conditional order permitting them to invest in equity and convertible debt securities of foreign issuers that, in each of their most recent fiscal years, derived more than 15% of their gross revenues from their activities as a broker, dealer, underwriter or investment adviser ("foreign securities companies") in accordance with the conditions of the proposed amendments to Rule 12d3-1.

FILING DATE: The application was filed on February 3, 1989, and was amended on March 26, 1990, and April 13, 1990.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 10, 1990, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. For AARP Growth Trust, Scudder Development Fund, Scudder Equity Trust, Scudder Funds Trust, Scudder Growth and Income Fund, Scudder Income Fund, and Scudder Variable Life Investment Fund, 175 Federal Street, Boston, MA 02110. For The Brazil Fund, Inc., The Korea Fund, Inc., Scudder Global Fund, Inc., Scudder International Fund, Inc., Scudder Mutual Funds, Inc., Scudder New Asia Fund, Inc., and Scudder New Europe Fund, Inc., 345 Park Avenue, New York, NY 10154.

FOR FURTHER INFORMATION CONTACT: Sheryl Siman Maliken, Staff Attorney, at (202) 272-2190, or Jeremy N. Rubenstein, Branch Chief, at (202) 272-3023 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee by either going to the SEC's Public Reference Branch or by contacting the SEC's commercial) copier at (800) 231-3282 (in Maryland (301) 258 4300).

Applicants' Representations

1. Each of the applicants is registered as a management investment company under the Act. The Brazil Fund, Inc., The Korea Fund, Inc., Scudder Development Fund, Scudder Equity Trust, Scudder Funds Trust, Scudder Global Fund, Inc., Scudder Growth and Income Fund, Scudder Income Fund, Scudder International Fund, Inc., Scudder Mutual Funds, Inc., Scudder New Asia Fund, Inc., Scudder New Europe Fund, Inc., and Scudder Variable Life Investment Fund are managed by SSC, a Delaware corporation. AARP Growth Trust is managed by AARP/Scudder Financial Management Company, a general partnership between AARP Financial Services Corp., a subsidiary of the American Association of Retired Persons and SSC.

2. Applicants seek to diversify their portfolios further by being permitted to invest in foreign issuers that, in their most recent fiscal year, derived more than 15% of their gross revenues from their activities as a broker, dealer, underwriter, or investment adviser.

3. Applicants seek relief from section 12(d)(3) of the Act and Rule 12d3–1 thereunder to invest in securities of foreign securities companies to the extent allowed in the proposed amendments to Rule 12d3–1. *See* Investment Company Act Release No. 17096 (Aug. 3, 1989), 54 FR 33027 (Aug. 11, 1989). Proposed amended Rule 12d3–1 would, among other things, facilitate the acquisition by applicants of equity securities issued by foreign securities companies. Applicants' proposed acquisitions of securities issued by foreign securities companies will satisfy each of the requirements of proposed amended Rule 12d3–1.

Applicants' Legal Conclusions

1. Section 12(d)(3) of the Act prohibits an investment company from acquiring any security issued by any person who is a broker, dealer, underwriter, or investment adviser. Rule 12d3–1 under the Act provides an exemption from section 12(d)(3) for investment companies acquiring securities of an issuer that derived more than 15% of its gross revenues in its most recent fiscal year from securities-related activities, provided the acquisitions satisfy certain conditions set forth in the rule. Applicants' proposed acquisitions of securities issued by foreign securities companies will comply with all of the provisions of current Rule 12d3–1, except subparagraph (b)(4) thereof. Subparagraph (b)(4) of Rule 12d3–1 provides that "any equity security of the issuer * * * [must be] a 'margin security' as defined in Regulation T promulgated by the Board of Governors of the Federal Reserve System." Since a "margin security" generally must be one which is traded in the United States markets, securities issued by many foreign securities firms would not meet this test. Accordingly, the Applicants seek an exemption only from the "margin security" requirements of Rule 12d3–1.

2. Proposed amended Rule 12d3–1 provides that the "margin security" requirement would be excused if the acquiring company purchases the equity securities of foreign securities companies that meet criteria comparable to those applicable to equity securities of United States securities-related businesses. The criteria, as set forth in the proposed amendments, "are based particularly on the policies that underlie the requirements for inclusion on the list of over-the-counter margin stocks." Investment Company Act Release No. 17096 (Aug. 3, 1989), 54 FR 33027 (Aug. 11, 1989).

Applicants' Condition

Applicants agree to the following condition in connection with the relief requested:

The Applicants will comply with the provisions of the proposed amendments to Rule 12d3–1 (Investment Company Act Release No. 17096 (Aug. 3, 1989); 54 FR 33027 (Aug. 11, 1989)), and as such amendments may be reproposed, adopted, or amended.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 90–9159 Filed 4–19–90; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–17428; 811–2912]

Medical Technology Fund, Inc.; Notice of Application for Deregistration

April 13, 1990.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application of Deregistration under Section 8(f) of the Investment Company Act of 1940 ("1940 Act").

APPLICANT: Medical Technology Fund, Inc.

RELEVANT 1940 ACT SECTIONS: Section 8(f) and Rule 8f–1.

SUMMARY OF APPLICATION: Applicant, a registered open-end, diversified, management investment company, seeks an order declaring that it has ceased to be an investment company as defined by the 1940 Act.

FILING DATE: The application on Form N–8F was filed on March 28, 1990.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 8, 1990, and should be accompanied by proof of service on the Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549; Applicant, 5 Sentry Parkway West, Suite 120, P.O. Box 1111, Blue Bell, PA 19422.

FOR FURTHER INFORMATION CONTACT: Brion R. Thompson, Special Counsel, at (202) 272–3016 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231–3282 (in Maryland (301) 258–4300).

Applicant's Representations

1. Applicant filed a Notification of Registration under the 1940 Act on March 14, 1979. Applicant's initial registration statement was declared effective on August 16, 1979.

2. On June 27, 1989, the Board of Directors of Applicant took action in compliance with Rule 17a–8 under the 1940 Act authorizing an Agreement and Plan of Reorganization (the "Plan") under which all of the assets and liabilities of Applicant would be transferred to G.T. Investment Funds, Inc. ("G.T. Investment"), a registered investment company, on behalf of G.T. Global Health Care Fund ("G.T. Fund"), a series of G.T. Investment (File No. 811–05426). The required majority of Applicant's shareholders approved the Plan on October 26, 1989.

3. Pursuant to the Plan, on October 30, 1989, Applicant assigned, sold, conveyed, transferred and delivered to the G.T. Fund all of its assets. In consideration, the G.T. Fund assumed

all of the obligations and liabilities of Applicant and delivered to Applicant a number of full and fractional shares of common stock of the G.T. Fund (the "G.T. Fund Shares"). Applicant distributed in complete liquidation pro rata to its shareholders of record as of October 30, 1989, the G.T. Fund Shares. No brokerage commissions were paid in connection with the Plan.

4. As of August 18, 1989, the record date for determination of shareholders of Applicant entitled to notice of, and to vote at, the Special Meeting of shareholders of Applicant, Applicant had 3,289,017 shares of beneficial interest outstanding, having an aggregate net asset value of $34,107,106 and a per share net asset value of $10.37. Following implementation of the Plan on October 30, 1989, Applicant had no shareholders.

5. Applicant and GT Fund each paid its own expenses for the reorganization and Plan. Applicant currently has no assets and no liabilities.

6. All of Applicant's required N–SAR filings have been made, including Applicant's N–SAR for the period ending December 31, 1989, which was filed on February 28, 1990, and Applicant will file its N–SAR for the period ending June 30, 1990.

7. Applicant is not engaged, and does not propose to engage, in any business activities other than those necessary for the winding-up of its affairs. Applicant is not a party to any current or pending litigation or administrative proceeding.

8. Except for the transaction described herein, Applicant has not, within the last 18 months, transferred any of its assets to a separate company or trust, the beneficiaries of which were or are security holders of Applicant.

9. Articles of Transfer between Applicant and G.T. Investment on behalf of the G.T. Fund, effecting the transfer of assets from Applicant to the G.T. Fund under Maryland law, were filed with the State Department of Assessments and Taxation of Maryland on October 30, 1989.

10. Following Applicant's reorganization as a portfolio of the G.T. Fund, upon receipt of the tax clearance certificate for Applicant from the State of Maryland, Articles of Dissolution for the Applicant will be filed with the State of Maryland and Applicant's registration as a Maryland corporation will be terminated by the Office of the Secretary of State, Baltimore, Maryland, as of the same date.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 90–9160 Filed 4–19–90; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 35–25072]

Filings Under the Public Utility Holding Company Act of 1935 ("Act")

April 13, 1990.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by May 7, 1990 to the Secretary, Securities and Exchange Commission, Washington, DC 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Getty Gas Gathering, Inc. (31–841)

Getty Gas Gathering, Inc. ("Getty Gas"), Texaco Center, 400 Poydras Street, New Orleans, Louisiana 70130, a wholly owned subsidiary of Texaco Producing, Inc. ("Texaco Producing"), which is in turn a wholly owned subsidiary of Texaco, Inc. ("Texaco"), has filed an application for an order under Section 2(a)(4) of the Act declaring that it is not a "gas utility company" because (i) it is primarily engaged in a business other than that of a gas utility company, and (ii) it distributes at retail only a small amount of natural gas.

Getty Gas, Texaco Producing and Texaco are Delaware corporations. Texaco, both directly and through its subsidiaries and affiliates, is principally engaged in worldwide exploration for, and production, transportation, refining and marketing of, crude oil, natural gas and petroleum products. Texaco Producing is the primary petroleum production subsidiary of Texaco and operates through approximately 42 direct or indirect subsidiaries, including Getty Gas. No Texaco subsidiary or affiliate, other than Getty Gas, owns or operates facilities in the business of distribution at retail of natural or manufactured gas.

Getty Gas is engaged in the transportation and sale of natural gas entirely in the State of Kansas. The primary purpose of Getty Gas is to supply gas to Texaco's refinery at El Dorado, Kansas. Getty Gas also makes limited retail sales to individuals, churches and schools under right of way easements that include provisions permitting a granting landowner the right to purchase gas from the system under "farm tap" arrangements. Under these arrangements, a short line is laid from the pipeline to a point on the customer's property where a meter is installed at the customer's cost. The terms of sale are set under contracts with the company.

At December 31, 1989, Getty Gas had a total of 270 retail customers under these arrangements. At no time since Texaco's acquisition of Getty Gas' pipeline system has the number of these retail customers exceeded 270. Retail sales figures were approximately $92,000 for the year ended December 31, 1988 and approximately $105,736 for the year ended December 21, 1989. Both figures represented approximately 0.7% of Getty Gas' total revenues.

Ford Motor Company; Rouge Steel Company (31–842)

Ford Motor Company ("Ford"), The American Road, Dearborn, Michigan 48121 and Rouge Steel Company ("Rouge"), 3001 Miller, Dearborn, Michigan 48121, both Delaware corporations, have filed an application for an order under section 2(a)(4) of the Act declaring that each is not a "gas utility company" because each (i) is primarily engaged in a business other than that of a gas utility company, and (ii) distributes at retail only a small amount of natural gas.

Ford is, among other things, a world-wide manufacturer of automobiles. Rouge, a fully-integrated producer of basic iron, raw steel and related steel, supplies much of Ford's steel

requirements for its automobile manufacturing operations. Both Ford and Rouge operate manufacturing facilities within the Rouge Industrial Complex ("Rouge Complex"), a vast integrated manufacturing facility in Dearborn, Michigan. The Rouge Complex contains facilities consisting of a powerhouse, electric distribution lines, power substations, steam generating and distribution equipment, compressed air generating and distribution equipment, turbo air generating equipment, and city and mill water distribution equipment (the "Facilities"). The powerhouse generates a substantial portion of the electricity consumed at the Rouge Complex by Ford and Rouge.

Rouge, formerly a wholly owned subsidiary of Ford, was acquired by and merged with Marico Acquisition Corporation ("Marico"), with Rouge as the surviving corporation. As part of the sale of Rouge, the parties agreed that the Facilities would be jointly owned by Ford ard Rouge as tenants-in-common, with Rouge holding an undivided 60% interest and Ford an undivided 40% interest. The Facilities are operated under a joint operating agreement between Ford and Rouge.

Since l979, Ford and Rouge have been parties to an agreement (as amended on December 23, 1981, the "Interconnection Agreement") with the Detroit Edison Company ("DECO"). The Interconnection Agreement provides, among other things, for the furnishing of mutual emergency and standby assistance. Pursuant to a letter agreement among Rouge, Ford and DECO dated December 12, 1989, the powerhouse has not provided electricity to DECO pending the receipt of appropriate orders, exemptions or waivers from this Commission and from the Federal Energy Regulatory Commission with respect to the operation of the powerhouse facility, including delivery of electricity to DECO under the Interconnection Agreement.

For each of 1988 and 1989, the revenues attributable to Rouge and to Ford under the Interconnection Agreement were less than 1% of their respective total operating revenues. Rouge's and Ford's interests in the powerhouse facility represent 1.5% and .004%, respectively, of each company's total assets.

Northeast Utilities (70–7701)

Northeast Utilities ("Northeast"), l74 Brush Hill Avenue, West Springfield, Massachusetts 01089, a registered holding company, has filed a declaration under sections 6(a) and 7 of the Act and Rule 50(a)(5) thereunder.

Northeast currently has in place an Amended and Restated Dividend Reinvestment and Common Share Purchase Plan, which was authorized by order of the Commission dated July 21, 1986 (HCAR No. 24153), and which allows only open market purchases of shares with reinvested dividends and optional cash payments made by holders of Northeast's common stock who are participants in such plan. Northeast now proposes to create a new dividend reinvestment plan ("DRIP"), which may purchase shares of Northeast's common stock on behalf of Northeast's common stockholders who participate in the DRIP either directly from Northeast or on the open market.

Northeast thus proposes to issue and sell to the DRIP from time-to-time through December 31, 1995 up to 10 million shares of its common stock ("Common Stock"), $5.00 par value per share. Northeast requests an exception from the competitive bidding requirements of Rule 50 pursuant to Rule 50(a)(5) for its issuance and sale of the Common Stock.

The DRIP will be administered by Northeast's system service company, Northeast Utilities Service Company ("Administrator"). It is proposed that the purchase price for Common Stock sold directly by Northeast under the DRIP will be the fair market value of Northeast's common stock on an original issue investment date. The fair market value is the average of the closing sales price for such shares as reported in *The Wall Street Journal* as Composite Transactions during the five trading days immediately preceding the original issue investment date. For Common Stock purchased on the open market the price will be equal to the weighted average price for all shares purchased with reinvested dividends and optional cash payments during the purchase period in which the participants' Common Stock was purchased.

Northeast will use the proceeds from the sale of the Common Stock issued under the DRIP to make loans or capital contributions to Northeast's subsidiaries and to repay short-term indebtedness of Northeast (HCAR Nos. 24750, 24893 and 24943, November 18, 1988, May 17, 1989 and August 28, 1989, respectively), to repay long-term indebtedness of Northeast, for general purposes of Northeast, or to make temporary investments in short-term high quality securities, pending the use by Northeast for the above mentioned purposes. Any additional use of proceeds by Northeast will be subject to further Commission authorization.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,
Secretary.

[FR Doc. 90–9153 Filed 4–19–90; 8:45 am]
BILLING CODE 8010-01-M

[Rel. No. IC–17425; 812–7506]

RCS Emerging Growth Fund; Notice of Application

April 13, 1990.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 ("1940 Act").

APPLICANT: RCS Emerging Growth Fund.

RELEVANT 1940 ACT SECTIONS: Exemption requested under Section 6(c) from the provisions of Sections 2(a)(32), 2(a)(35), 22(c) and 22(d) and Rule 22c–1.

SUMMARY OF APPLICATION: Applicant seeks an order amending a prior order that permitted the applicant to assess a contingent deferred sales load ("CDSL") on certain redemptions of its existing series of shares and all future series of shares and to waive the CDSL for certain specified types of redemptions. The amended order would permit the applicant to waive the CDSL for additional types of redemptions.

FILING DATE: The application was filed on April 4, 1990.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 10, 1990, and should be accompanied by proof of service on the applicant in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, One Embarcadero Center, Suite 300, San Francisco, CA 94111.

FOR FURTHER INFORMATION CONTACT: Barry A. Mendelson, Staff Attorney, at

(202) 504–2284, or Jeremy N. Rubenstein, Branch Chief, at (202) 272–3023 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee from the SEC's Public Reference Branch in person or from the SEC's commercial copier, who can be contacted at (800) 231–3282 (in Maryland (301) 258–4300).

Applicant's Representations

1. Applicant is a Massachusetts business trust which was organized on May 11, 1987 and which has been registered as an open-end, diversified management investment company since November 30, 1987. Applicant currently issues only one series of shares, which series bears the same name as applicant. Applicant may, in the future, offer additional series of shares.

2. Applicant was organized and sponsored by Robertson, Colman & Stephens. Robertson, Stephens & Company (the "Distributor"), a successor of Robertson Colman & Stephens, distributes applicant's shares. Avon Capital Management Corporation, a wholly-owned subsidiary of the Distributor, serves as applicant's investment adviser.

3. Applicant's shares are offered and sold without the deduction of a sales load at the time of purchase. Certain redemptions of shares, however, are subject to a CDSL, which the applicant is permitted to impose pursuant to an existing order of the SEC. Investment Company Act Release Nos. 16241 (Jan. 28, 1988) (notice) and 16289 (Feb. 26, 1988) (order) (the "Prior Order"). The proceeds of the CDSL are paid to the Distributor and are used by the Distributor to defray the costs incurred in connection with the sale of applicant's shares.

4. Pursuant to the Prior Order, the CDSL is currently imposed on a redemption of shares that causes the current aggregate value of all of the shares held by a shareholder to fall below the total dollar amount of payments for the purchase of shares made by such shareholder during the preceding three years. Shares are redeemed in a manner designed to result in the lowest possible charge to the redeeming shareholder. A CDSL is imposed only to the extent that the net asset value of the shares redeemed by a shareholder exceeds the sum of (i) the current net asset value of shares purchased more than three years prior to the redemption, (ii) the current net asset value of shares purchased through reinvestment of dividends or capital gains distributions, and (iii) increases in the net asset value of shares purchased during the preceding three years.

5. Pursuant to the Prior Order, applicant waives the CDSL with respect to the following types of redemptions: (i) Redemptions of shares in connection with certain post-retirement distributions and withdrawals from retirement plans (which are permitted to be made without penalty under the Internal Revenue Code of 1986) or following the death or disability of a shareholder, (ii) redemptions by employee benefit plans maintained for or by the employees of the Distributor, (iii) involuntary redemptions, and (iv) redemptions of shares issued as part of a private placement effected prior to the public offering of shares.

6. Applicant now proposes to waive the CDSL on the following additional types of redemptions: (i) redemptions of shares by investors whose combined initial and subsequent investment(s) (including reinvested dividends) have been or at the time of the redemption are in excess of $50,000; (ii) redemptions of shares by "institutional investors" as defined in section 25102(i) of the California Corporate Securities Law of 1968 and the regulations thereunder; and (iii) redemptions of shares by individual retirement accounts, Keogh Plans, and other qualified retirement accounts or employee benefit plans recognized under the Internal Revenue Code.

Applicant's Legal Analysis

1. Applicant believes that its waiving of the CDSL on the additional types of redemptions described above in paragraph 6 is consistent with the policies underlying the 1940 Act, is fair and in the best interests of applicant's shareholders and will not harm applicant or its shareholders, or unfairly discriminate among shareholders or purchasers.

2. The additional waivers are intended to attract additional investment dollars into applicant. To the extent more money is invested in applicant, all shareholders will benefit as a result of a decrease in applicant's operating expenses as a percentage of net asset value allocable to each share of the applicant.

Applicant's Conditions

If the requested order is granted, applicant expressly consents to the following condition:

1. Applicant will comply with the provisions of proposed Rule 6c–10 under the 1940 Act, as it currently exists and as it may be modified or adopted in the future.

For the SEC, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 90–9161 Filed 04–19–90; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC—17426; 812–7418]

Renaissance Capital Partners, Ltd.; Notice of Application

April 13, 1990.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 ("1940 Act").

APPLICANTS: Renaissance Capital Partners, Ltd. (the "Partnership"), Renaissance Capital Group, Inc. (the "Managing General Partner"), and Ernest C. Hill and Don M. Patterson (the "Independent General Partners").

RELEVANT 1940 ACT SECTIONS: Exemption requested under section 6(c) from the provisions of sections 2(a)(19) and 2(a)(3)(D) of the 1940 Act.

SUMMARY OF APPLICATION: Applicants seek an order determining that: (1) the Independent General Partners are not "interested persons" of the Partnership or of the Managing General Partner within the meaning of section 2(a)(19) of the 1940 Act solely by reason of being general partners of the Partnership; and (2) limited partners who own less than 5% of the Partnership units will not be "affiliated persons" of the Partnership or of other limited or general partners within the meaning of section 2(a)(3)(D) of the 1940 Act solely by reason of their being limited partners.

FILING DATE: The application was filed on October 30, 1989, amended on January 15, 1990, March 12, 1990, and April 9, 1990.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 10, 1990, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and

the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicants, Elroy G. Roelke, Esq., 100 Collins Drive, Sherman, Texas 75090.

FOR FURTHER INFORMATION CONTACT: Barbara Chretien-Dar, Staff Attorney, at (202) 272–3022, or Stephanie Monaco, Branch Chief, at (202) 272–3030 (Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier Who can be contacted at (800) 231–3282 (in Maryland (301) 258–4300).

Applicant's Representations

1. The Partnership is a Texas limited partnership governed by an Amended Agreement and Articles of Limited Partnership (the "Partnership Agreement"). The Partnership has a term of eight years from the final closing of the Partnership offering, or June 30, 1997, whichever is later. The Partnership will elect to be regulated as a business development company under section 54(a) of the l940 Act and, therefore, will be subject to sections 55 through 65 and those sections of the 1940 Act made applicable by section 59 thereof. The investment objective of the Partnership is to provide current income and long-term capital appreciation by investing in private placement convertible debt of smaller public companies.

2. The Partnership seeks to obtain initial capital of up to $50 million by offering to sell up to 500 units of Partnership interest at a price of $100,000 each ("Units"). Sales will be made solely to accredited investors in a non-public offering pursuant to section 4(2) of the Securities Act of 1933, as amended, and Regulation D thereunder. The minimum investment allowed is one-quarter Unit. Sales will be made through certain registered broker-dealers on a best efforts basis and by officers of the Managing General Partner. Generally, officers and directors of the Managing General Partner will not receive a commission or fee for any offering placements with the exception of one officer who is also a registered representative of one of the Partnership's selling agents. Upon completion of the offering, the Partnership will file a registration statement pursuant to section 12(g) of the Securities Exchange Act of 1934, as amended.

3. The general partners (the "General Partners") consist of the Managing General Partner and the Independent General Partners (defined as individuals who are not "interested persons" of the Partnership within the meaning of the 1940 Act). A majority of the General Partners will be Independent General Partners.

4. The Managing General Partner will register as an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act") prior to the Partnership's commencement of business. Under the Partnership Agreement, the Managing General Partner will be principally responsible, subject to the supervision of the Independent General Partners, for portfolio investment decisions. Further duties of the Managing General Partner include maintaining Partnership records and administering the Partnership's affairs, including preparation of tax and other reports to holders of Partnership Units (the "Limited Partners").

5. The Independent General Partners will provide overall supervision of the Partnership and perform duties generally imposed on directors of business development companies under the 1940 Act. Specifically, the Independent General Partners will establish criteria for the investigation and analysis of new investments and will oversee the Managing General Partner's compliance with such standards. Proposed investments not meeting such standards will require prior approval of the Independent General Partners.

6. Under the Partnership Agreement, the Managing General Partner may be removed for cause by unanimous action of the Independent General Partners after having obtained the consent of a majority in interest of the Limited Partners. Similarly, an Independent General Partner may be removed for cause by the unanimous action of the remaining General Partners after having obtained the consent of a majority in interest of the Limited Partners. Further, any General Partner shall be removed upon failure to be re-elected by a majority in interest of Limited Partners at any meeting held to vote on their continuance as partners. The Managing General Partner shall be removed if the investment advisory contract is not specifically approved on an annual basis pursuant to Section 15(a)(2) of the 1940 Act.

7. In the event of an Independent General Partner's removal, a successor Independent General Partner shall be designated by the remaining Independent General Partner. Should the remaining Independent General Partner fail to act within 60 days of such removal, the Managing General Partner shall designate a successor Independent General Partner. In the event of the Managing General Partner's removal, the Independent General Partners shall within 60 days designate a successor Managing General Partner or call a meeting of the Limited Partners for the purpose of electing a successor Managing General Partner or dissolving the Partnership. In all cases of a General Partner's removal or withdrawal, the designation of a successor is subject to the Limited Partners' right (if called by Limited Partners holding 10% in interest) to request an election to fill the vacancy.

8. The Managing General Partner may voluntarily withdraw at the end of any fiscal quarter, subject to the unanimous approval of the Independent General Partners and concurring consent of a majority in interest of Limited Partners. In addition, the Managing General Partner must provide 60 days prior notice to all Partners and designate a substitute Managing General Partner. Such substitute Managing General Partner shall certify that (a) it will assume the duties of the Managing General Partner under the Partnership Agreement without receiving additional compensation; (b) it will maintain a net worth sufficient to preserve the Partnership's status under federal tax law; and (c) it will employ persons experienced in performing the functions of the Managing General Partner under the Partnership Agreement.

9. Under the Partnership Agreement, the Limited Partners have no authority to participate in the management of the Partnership, except for the right to vote on certain matters. Prior to the exercise by the Limited Partners of any of its voting rights, the Partnership will obtain an opinion of independent counsel that the existence or exercise of such voting rights will not adversely affect the limited liability of the Limited Partners under state law. The Partnership Agreement further obligates the General Partners to take all appropriate and necessary actions to protect the limited liability of the Limited Partners. The Independent General Partners will periodically, and at least annually, review the adequacy of its insurance coverage and the appropriateness of obtaining an errors and omissions policy.

10. In addition to certain organizational and operational management fees, the Managing General Partner will be eligible to receive capital gains performance distributions, provided that such performance fee is payable only to the extent that

distributed income and gains to the Limited Partners exceed a 10% average annual performance base as further described in the application. The Independent General Partners will each receive compensation of $6,000 per quarter plus expenses, such compensation to double if total initial Partnership capitalization exceeds $25 million. Any increase in the compensation of the Independent General Partners requires an amendment to the Partnership Agreement. The Independent General Partners will not receive any other fees.

Applicants' Legal Analysis

11. The Small Business Investment Incentive Act of 1980 added certain provisions to the 1940 Act recognizing that a business development company could be organized as a limited partnership. Section 56(a) of the 1940 Act requires that a majority of a business development company's directors or general partners not be "interested persons" of such company. Section 2(a)(19) of the 1940 Act includes in the definition of an interested person an "affiliated person" of such investment company. Section 2(a)(3)(D) of the 1940 Act provides further that an affiliated person means any "officer, director, partner, co-partner,* * * of such other person." However, Section 2(a)(19)(A)(aa) excepts from the definition of interested persons of an investment company those individuals who would be interested persons solely because they serve as directors. There is no equivalent exception for partners, and the Independent General Partners are, therefore, interested persons of the Partnership and interested persons of the Managing General Partner by virtue of being co-partners with the Managing General Partner. To resolve this problem, Applicants request that the Independent General Partners be exempted from Section 2(a)(19) of the 1940 Act to the extent that they would be deemed "interested persons" of the Partnership and of the Managing General Partner solely because such Independent General Partners are general partners of the Partnership and co-partners with the Managing General Partner. The Partnership has been structured so that the Independent General Partners are the functional equivalents of non-interested directors of an incorporated investment company.

12. Under Section 2(a)(3) of the 1940 Act, each Limited Partner of the Partnership is an affiliated person of the Partnership and of each other Limited and General Partner because he or she is a partner of the Partnership, as well as a co-partner of each Limited and General Partner. Section 2(a)(3) also excepts from the definition of "affiliated person" shareholders with less than a 5% ownership interest of a company. Applicants thus request that Limited Partners owning less than 5% of the Partnership Units be exempt from section 2(a)(3)(D) to the extent that they otherwise would be deemed to be affiliated persons of the Partnership and of any Limited or General Partners solely by reason of their status as Limited Partners.

Applicants Conditions:

If the requested order is granted, the Applicants agree to the following conditions:

1. The General Partners, except the Managing General Partner, are natural persons ("Individual General Partners"). A majority of the Individual General Partners will not be interested persons of the Partnership.

2. The Individual General Partners will assume the responsibilities and obligations imposed by the Act and the regulations thereunder on directors or general partners of a business development company. The Independent General Partners will assume the responsibilities and obligations imposed by the 1940 Act and the regulations thereunder on directors and general partners who are not interested persons of a business development company.

3. The Partnership Agreement will provide that the Managing General Partner will not resign or withdraw unless a successor managing general partner has been appointed in accordance with the Partnership Agreement and the provisions of sections 15(a), 15(c), and 15(f) of the 1940 Act.

4. The Limited Partners will be afforded all of the voting rights required by the 1940 Act. The Partnership will obtain an opinion of counsel that the voting rights provided the Limited Partners do not subject the Limited Partners to liability as general partners under Texas law. If a Limited Partner transfers his Units in a manner which is effective under the Partnership Agreement, the General Partners will promptly take all necessary actions to ensure that such transferee or successor becomes a substitute Limited Partner.

5. The Partnership will obtain an opinion of counsel that the distributions and allocations provided for in the Partnership Agreement are permissible under section 205(a) of the Advisers Act and under section 15(a) of the 1940 Act. Except to the extent that the Partnership Agreement allocates income, gain, and loss pro rata to all partners in proportion to their capital contributions, the Managing General Partner and all other investment advisers to the Partnership will not receive or be allocated any portion of capital gains or capital appreciation if, as a result, cumulative allocations or payments of capital gains or capital appreciation to such persons would exceed 20% of cumulative realized capital gains, net of realized capital losses and unrealized capital depreciation.

6. The Partnership will obtain an opinion of counsel that the current structure of the Partnership will entitle it to be taxed as a partnership for federal income tax purposes.

7. If, under the Partnership Agreement, the Partnership is or becomes authorized to make in-kind distributions of portfolio securities, no such in-kind distributions will be made until such time as the Partnership has obtained a no-action letter from the staff of the SEC or, alternatively, has obtained an order pursuant to section 206A of the Advisers Act permitting such distribution.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan Katz,

Secretary.

[FR Doc. 90-9162 Filed 4-19-90; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-17427; 812-7476]

Zweig Tax-Free Fund Inc; Notice of Application

April 13, 1990.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for an order under the Investment Company Act of 1940 (the "1940 Act").

APPLICANT: Zweig Tax-Free Fund Inc., formerly DBL Tax-Free Fund Inc.

RELEVANT 1940 ACT SECTIONS: Exemption requested under Section 6(c) from the provisions of sections 2(a)(32), 2(a)(35), 22(c), and 22(d) of the Act and Rules 22c-1 and 22d-1 thereunder.

SUMMARY OF APPLICATION: The applicant seeks an amendment to an existing order under Section 6(c) (the "Existing Order") which permits the applicant to impose a contingent deferred sales load (a "CDSC") on redemptions of its shares in certain cases. The requested relief would permit the applicant to impose a CDSC on redemptions of its shares under additional circumstances.

FILING DATE: The application was filed on February 12, 1990 and amended on March 30, 1990.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 11, 1990, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC. 20549. Applicant, 25 Broadway, New York, New York 10004.

FOR FURTHER INFORMATION CONTACT: Robert B. Carroll, Staff Attorney, at (202) 272–3043, or Jeremy N. Rubenstein, Branch Chief, at (202) 272–3023 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee by either going to the SEC's Public Reference Branch or contacting the SEC's commercial copier at (800) 231–3282 (in Maryland (301) 258–4300).

Applicant's Representations

1. The applicant is a diversified, open-end management investment company registered under the 1940 Act. The applicant was incorporated under the laws of Maryland on December 20, 1982.

2. The applicant's investment adviser is Zweig/Glaser Advisers (the "Adviser") and its principal distributor is Zweig Securities Corp. (the "Distributor"). Before September 2, 1989, the applicant's adviser and distributor were, respectively, Drexel Management Corporation and Drexel Burnham Lambert Incorporated.

3. The shares of each portfolio of the applicant, except the Money Market Portfolio, are offered to investors at net asset value plus a front-end sales load that declines depending upon the amount invested. The applicant waives the front-end sales load for purchases by or on behalf of any officer, director, account executive, or full-time employee of the applicant, the Adviser, or the Distributor (a "Qualified Purchase"). The Existing Order permits the applicant to impose a CDSC on redemptions of its shares with respect to which the front-end sales load has been waived when such redemptions occur within 90 days of the Qualified Purchase.

4. The applicant intends to waive the front-end sales load on shares purchased by or on behalf of any employee (or a spouse or child of any employee) of any National Association of Securities Dealers ("NASD") member. The applicant seeks an amendment to the Existing Order to impose a CDSC if such shares are redeemed within 90 days of the date of purchase. The CDSC would be equal to the applicable front-end sales load, had such load not been waived, on the lesser of the net asset value of the shares at the time of purchase or the net asset value at the time of redemption. The maximum amount of the CDSC, or any combination of deferred sales load and any sales load payable at the time the shares are purchased, will not exceed the maximum sales charge that could have been imposed at the time the shares were purchased under Article III, Section 26(d) of the Rules of Fair Practice promulgated by the NASD. No amount will be charged to shareholders or the applicant's funds that is intended as payment of interest or any similar charge related to a CDSC, nor will any CDSC be imposed on an amount that represents an increase in the value of applicant's shares due to capital appreciation or on shares, or amounts representing shares, purchased through reinvestment of dividends or capital gain distributions.

5. The applicant requests that the proposed relief extend to any additional portfolios of the applicant that may be offered in the future on substantially the same basis. The applicant further requests that the proposed relief, as well as the exemptive relief previously granted, as such relief may be modified pursuant hereto, extend to any open-end management company established or acquired in the future by the Adviser, or any affiliated person of the Adviser as defined in section 2(a)(3) of the Act, that is part of the same group of investment companies (as defined in Rule 11a–3 under the Act) as the applicant.

Applicant's Legal Conclusions

Applicant submits that the requested exemption is appropriate and in the public interest, consistent with the protection of investors, and consistent with the purposes fairly intended by the policy and provisions of the 1940 Act. The intended effect of the waiver of the sales load on Qualified Purchases is to encourage those individuals who may be involved in the management, administration, or marketing of the shares of the applicant to acquire and maintain an equity position in the applicant. To further promote this objective, and because short-term trading in shares of the applicant would defeat the purpose of the waiver, applicant has proposed the CDSC described above. The effect of the imposition of the CDSC upon the redemption of certain shares purchased by NASD members would merely be to impose a condition on the availability of the waiver of the front-end sales load, namely that shares purchased subject to the waiver be held for 90 days.

Applicant's Condition

The applicant will comply with the representations in the application concerning its CDSC arrangements and the provisions of proposed Rule 6c–10 under the 1940 Act, as such rule is currently proposed and as it may be reproposed, adopted, or amended.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 90–9163 Filed 4–19–90; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF TRANSPORTATION

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended April 13, 1990

The following applications for certificates of public convenience and necessity and foreign air carrier permits were filed under subpart Q of the Department of Transportation's Procedural Regulations (see 14 CFR 302.1701 et seq.). The due date for answers, conforming application, or motion to modify scope are set forth below for each application. Following the answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: 46896.

Date filed: April 13, 1990.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: April 27, 1990.

Description: Conforming Application of American Airlines, Inc., pursuant to section 401 of the Act and subpart Q of the Regulations, applies for amendment of its certificate of public convenience and necessity for Route 137 so as to authorize foreign air transportation of

persons, property, and mail between Chicago and West Berlin.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 90-9220 Filed 4-19-90; 8:45 am]

BILLING CODE 4910-62-M

Coast Guard

[CGD 90-021]

Navigation Safety Advisory Council; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. app. 2), this notice announces a meeting of the Navigation Safety Advisory Council (NAVSAC) to be held Monday through Wednesday, May 7-9, 1990, at the Waterfront Hotel, 80 Compromise Street, Annapolis, Maryland. The meeting will begin at 8:30 a.m. and end at 5 p.m. each day.

The agenda for the meeting includes the following:

1. Committee meetings on Monday, May 7th and the morning of Tuesday, May 8th concerning the following:

a. Vertical sector of electric lights requirement for unmanned barges operating in COLREG waters;

b. Location of forward masthead light on vessels less than 50 meters in length;

c. Special yellow flashing light for barges being towed alongside in inland waters;

d. Navigational light sector coding systems/radar sidelight transponders;

e. Navigation lights on sailing vessels to make them more conspicuous at night;

f. Bridge-to-bridge radiotelephone requirements: (1) Seaplane communications and (2) power-driven and sailing vessel agreements vis-a-vis sound signals;

g. Vessel routing measures: Chesapeake Bay Southern Approach Traffic Separation Scheme (TSS), off-California TSS and Shipping Safety Fairways (SSF), Channel Islands National Marine Sanctuary "Area to be Avoided", and Florida Keys "Area to be Avoided";

h. International Maritime Organization (IMO) provisional performance standards for electronic chart display systems (ECDIS); and,

i. Whistle signals for larger vessels transitting areas with heavy concentrations of smaller craft.

2. The Council will convene in plenary session on Tuesday, May 8th at 1 p.m., and continue on Wednesday until finished. The agenda will include status reports and information items on ongoing projects, reports by the committees noted in paragraph 1 above, and any other matters properly brought before the Council.

The meeting is open to the public. Members of the public may present oral statements. Persons wishing to present oral statements should notify the Executive Director no later than the day before the meeting. Any member of the public may present a written statement to the Council at any time.

Additional information may be obtained from Commander Thomas J. Meyers, Executive Director, Navigation Safety Advisory Council, U.S. Coast Guard (G-NSR-3), Washington, DC 20593-0001, or Lieutenant Steven R. Godfrey, Telephone (202) 267-0367.

Dated: April 13, 1990.

L.J. Black,

Captain, U.S. Coast Guard, Acting Chief, Office of Navigation Safety and Waterway Services.

[FR Doc. 90-9152 Filed 4-19-90; 8:45 am]

BILLING CODE 4910-14-M

Federal Aviation Administration

Organizations, Functions, and Authority Delegations: Chief Counsel for Litigation et al.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of delegation of authority.

SUMMARY: The FAA is giving notice of a delegation of authority from the Administrator to the Chief Counsel and the Assistant Chief Counsel for Litigation with regard to actions brought under the FAA's civil penalty authority. The delegation of authority was by memorandum, signed by the Administrator on January 29, 1990. The FAA is publishing the text of the delegation so that it is available to interested parties. The FAA referred to this delegation, and notice of its publication, in a final rule published concurrently with this notice in a separate section of the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: James S. Dillman, Assistant Chief Counsel for Litigation (AGC-400), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3661.

SUPPLEMENTARY INFORMATION: The text of the delegation of authority in pertinent part: Pursuant to 49 U.S.C. 322(b) and 14 CFR 13.202, I hereby delegate to the Chief Counsel and to the Assistant Chief Counsel for Litigation the following authority with regard to actions brought under the Civil Penalty Assessment Demonstration Program:

(a) To grant or deny extensions of time to file briefs; to grant or deny requests to file additional briefs; and to approve or disapprove other deviations from, or requests for changes in, procedural requirements;

(b) To stay the effectiveness of decisions or orders pending reconsideration by the FAA decisionmaking;

(c) To issue orders staying, pending judicial review, orders of the FAA decisionmaker, and to consent to the entry of judicial stays with respect to such orders;

(d) To issue orders dismissing appeals from initial decisions of administrative law judges pursuant to the request of the appellant or due to failure to prosecute;

(e) To dismiss, summarily, petitions to reconsider or modify which are repetitious or frivolous; and,

(f) To correct FAA decisionmaker orders by eliminating typographical, grammatical, and similar errors, and making editorial changes therein not involving matters of substance.

Issued in Washington, DC, on April 17, 1990.

Gregory S. Walden,

Chief Counsel.

[FR Doc. 90-9175 Filed 4-17-90; 12:23 pm]

BILLING CODE 4910-13-M

Federal Railroad Administration

Petitions for Waivers of Compliance

In accordance with 49 CFR 211.9 and 211.41, notice is hereby given that the Federal Railroad Administration (FRA) has received requests for waivers of compliance with certain requirements of the federal safety law and regulations. The individual petitions are described below, including the parties seeking relief, the regulatory provisions involved, the nature of the relief being requested and the petitioner's argument in favor of relief.

Burlington Northern Railroad

Waiver Petition Docket Numbers PB-90-1 and SA-90-1

The Burlington Northern Railroad (BN) request waivers of compliance with certain provisions of the Railroad Power Brakes and Drawbars Regulations (49 CFR part 232), under Docket No. PB-90-1, and the Safety Appliance Regulations (49 CFR part 231), under Docket No. SA-90-1.

The BN seeks these waivers of compliance to permit the operation of railroad/highway vehicles which are

designated as "RoadRailer" units. The BN is exploring opportunities to operate Mark IV and Mark V RoadRailer units over its own railroad without involvement with any previous waivers.

At the present time, a combined total of approximately 2,000 Mark IV and Mark V RoadRailer units are being operated by the Norfolk Southern (NS) Corporation under a temporary conditional waiver (Docket Numbers SA–87–2 and PB–87–4) issued by FRA on July 28, 1987. These vehicles are almost identical in configuration to the standard semi-trailer presently used to haul cargo over the highway. The Mark IV RoadRailers are equipped with a special drawbar, railroad running wheels mounted on a single axle located between the tandem semi-trailer wheels, and a special railroad air brake system. The Mark V RoadRailers are similar in most respects to the Mark IVs, except that they are supported and transported on a 70-ton standard freight car truck, each truck being equipped with an ABDW air brake system, instead of a self contained wheel/axle set. The RoadRailer vehicles, by design, cannot be subjected to traditional switching procedures conducted in railroad classification yards. The coupler assembly will only couple to another RoadRailer or to a specially designed adapter car between the locomotive and a RoadRailer train.

The temporary conditional waiver granted to the NS permits noncompliance with all the provisions of the Safety Appliance Standards (49 CFR part 231). These standards include provisions that provide the number, location and dimensional specifications for the handholds, ladders and sill steps that are required for each railroad car. The RoadRailers are not in compliance with the drawbar standard height above the top of the rail, 49 CFR § 232.2; the standard height is 23½ inches to 34½ inches measured from the center of the coupler to the top of the rail. The RoadRailer coupler is 49 inches above the top of the rail in order to accommodate the height of the semi-trailer fifth-wheel assembly.

Therefore, the BN requests a waiver of compliance with the applicable Code of Federal Regulations to permit stand-alone operation of the RoadRailers subject to the following conditions:

1. Initial operation would be between the Midway Hub Center in St. Paul, Minnesota, to and from International Falls Minnesota, a one way distance of about 323 miles.

2. A maximum of 75 RoadRailer units with an adaptor unit and required locomotives would make up the train consist.

3. Trains would be proposed to operate on a five day per week schedule.

4. Initial maintenance of the RoadRailer equipment would be done by qualified contract personnel.

5. Necessary training for BN personnel would be available for those involved in inspection, assembly, disassembly and movement of the RoadRailers.

As future markets and traffic lanes for RoadRailer service are identified, FRA will be given timely notice for expansion of waiver authority.

Consolidated Rail Corporation

Norfolk Southern Corporation

Waiver Petition Docket Numbers PB–90–2 and SA–90–4

The Consolidated Rail Corporation (Conrail) and the Norfolk Southern Corporation (NS) (on behalf of its operating subsidiaries) jointly request waivers of compliance with certain provisions of the Railroad Power Brakes and Drawbar Regulations (49 CFR part 232), under Docket No. PB–90–2, and the Safety Appliance Standards (49 CFR part 231), under Docket No. SA–90–4.

Conrail and NS seek these waivers of compliance to permit the operation of railroad/highway vehicles which are designated as "RoadRailer" units. Conrail and NS are entering into an agreement for Conrail to use NS RoadRailer equipment between Hagerstown, Maryland and points in northern New Jersey. Conrail proposes to interchange the RoadRailer equipment with the NS in Hagerstown.

At the present time, a combined total of approximately 2,000 Mark IV and Mark V RoadRailer units are being operated by the NS under a temporary conditional waiver (Docket Numbers SA–87–2 and PB–87–4) issued by FRA on July 28, 1987. (See notice of waiver petitions, 52 FR 16326, May 4, 1987, for more detailed discussion.) These vehicles are almost identical to the standard semi-trailer presently used to haul cargo over the highway. The Mark IV RoadRailers are equipped with a special drawbar, railroad running wheels mounted on a single axle located between the tandem semi-trailer wheels, and a special railroad air brake system. The Mark V RoadRailers are similar in most respects to the Mark IVs, except that they are supported and transported on a standard 70-ton freight car truck instead of a self contained wheel/axle set. Each Mark V truck is equipped with an ABDW air brake system.

The RoadRailer vehicles, by design, cannot be subjected to traditional switching procedures conducted in railroad classification yards. The coupler assembly will only couple to another RoadRailer or to a specially designed adapter car between the locomotive and a RoadRailer train, and the drawbar height is nonstandard. The temporary conditional waiver granted to the NS permits noncompliance with all the provisions of the Safety Appliance Standards (49 CFR part 231). These standards include provisions that provide the number, location and dimensional specifications for the handholds, ladders and sill steps that are required for each railroad car. The RoadRailers are not in compliance with the drawbar standard height above the top of the rail, 49 CFR 232.2; the standard height is 34½ inches to 31½ inches measured from the top of the rail to the center of the coupler. The RoadRailer coupler is 49 inches above the top of the rail in order to accommodate the height of the semi-trailer fifth-wheel assembly.

It was for these reasons that the NS applied for relief from parts 231 and 232. It is for the same reasons that Conrail and NS are seeking conditional waivers similar to those that were granted to the NS. One of the conditions of the NS temporary waiver is that the NS is not permitted to interchange the RoadRailer units with any other railroads, except the operating subsidiaries of the NS Corporation (Norfolk Western Railway and the Southern Railway). Conrail and NS are petitioning the FRA to have this condition modified so as to allow interchange of the RoadRailer units between Conrail and NS to provide the service described in the Conrail's petition. Conrail and NS would agree to all other terms and conditions that presently exist for the operation of the RoadRailer equipment by the NS.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number PB–88–2) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel,

Federal Railroad Administration, Nassif Building, 400 Seventh Street SW., Washington, DC 20590. Communications received before June 8, 1990 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m. to 5 p.m.) in room 8201, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590.

Issued in Washington, DC on April 10, 1990.

J.W. Walsh,

Association Administrator for Safety.

[FR Doc. 90-9219 Filed 4-17-90; 8:45 am]

BILLING CODE 4910-06-M

National Highway Traffic Safety Administration

National Driver Register Advisory Committee; Public Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463, 5 U.S.C. app. I), notice is hereby given of a meeting of the National Driver Register Advisory Committee to be held on April 26 and 27, 1990, in Washington, DC. The meeting will be held at the Washington Plaza Hotel, Vermont and Massachusetts Avenues, NW., from 9 a.m. to 4:30 p.m. on April 26, and from 9 a.m. to noon on April 27. Topics to be discussed are: NDR status, the Report to Congress, NDR relationship to the Commercial Driver License Information System (CDLIS) and the AAMVA telecommunications network (AAMVANET), and the NDR Notice of Proposed Rulemaking related to procedures for States' transition to the Problem Driver Pointer System.

The meeting is open to the interested public, but may be limited in attendance to space available. Members of the public may present a written statement to the Committee at any time. With the approval of the Chairperson, members of the public may present oral statements at the meeting. Additional information is available from the National Driver Register, room 6124, 400 Seventh Street, SW., Washington, DC 20590, telephone 202/366-4800.

Issued in Washington, DC, on April 10, 1990.

Clayton E. Hatch,

Chief, National Driver Register.

[FR Doc. 90-9150 Filed 4-19-90; 8:45 am]

BILLING CODE 4910-59-M

Sunshine Act Meetings

Federal Register
Vol. 55, No. 77
Friday, April 20, 1990

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11 a.m., Friday, May 4, 1990.

PLACE: 2033 K Street, NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 90–9293 Filed 4–18–90; 8:45 am]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11 a.m., Friday, May 11, 1990.

PLACE: 2033 K Street, NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 90–9294 Filed 4–18–90; 8:45 am]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11 a.m., Friday, May 18, 1990.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 90–9295 Filed 4–18–90; 8:45 am]
BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11 a.m., Friday, May 25, 1990.

PLACE: 2033 K Street, NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 90–9296 Filed 4–18–90; 8:45 am]
BILLING CODE 6351–01–M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: 10 a.m., Wednesday, April 25, 1990.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Open.

MATTERS TO BE DISCUSSED:

Summary Agenda

Because of its routine nature, no substantive discussion of the following item is anticipated. This matter will be voted on without discussion unless a member of the Board requests that the item be moved to the discussion agenda.

1. Publication for comment of proposal to notify receivers of off-line Fedwire funds transfers.

Discussion Agenda

2. Proposal to establish uniform operating hours for the Fedwire network (Proposed earlier for public comment; Docket No. R–0676)

3. Any items carried forward from a previously announced meeting.

Note: This meeting will be recorded for the benefit of those unable to attend. Cassettes will be available for listening in the Board's Freedom of Information Office, and copies may be ordered for $5 per cassette by calling (202) 452–3684 or by writing to: Freedom of Information Office, Board of Governors of the Federal Reserve System, Washington, DC 20551.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

April 18, 1990.

Jennifer J. Johnson,
Associate Secretary of the Board.

[FR Doc. 90–9334 Filed 4–18–90; 1:15 pm]
BILLING CODE 6210–01–M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

TIME AND DATE: Approximately 11 a.m., Wednesday, April 25, 1990, following a recess at the conclusion of the open meeting.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: April 17, 1990.

Jennifer J. Johnson,
Associate Secretary of the Board.

[FR Doc. 90–9335 Filed 4–18–90; 1:51 pm]
BILLING CODE 6210–01–M

RESOLUTION TRUST CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Board of Directors of the Resolution Trust Corporation will meet in open session at 2:00 p.m. on Tuesday, April 24, 1990 to consider the following matters:

Summary Agenda

No Cases.

Discussion Agenda

RTC Policy Statement on Determination of Distressed Real Estate Markets.

RTC Policy on the Accelerated Resolution Process.

RTC Policy for Determining Market Value for Real Estate Assets.

The meeting will be held in the Board Room of the FDIC Building located at 550–17th Street NW., Washington, DC.

Requests for further information concerning the meeting may be directed

to Mr. John M. Buckley, Jr., Executive Secretary of the Resolution Trust Corporation, at (202) 898–3604.

Dated: April 17, 1990.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

[FR Doc. 90–9321 Filed 4–18–90; 8:45 am]

BILLING CODE 6714–01–M

Corrections

Federal Register
Vol. 55, No. 77
Friday, April 20, 1990

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Adminstration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds: Lasalocid; Correction

Correction

In rule document 90-3502 beginning on page 5445 in the issue of Thursday, February 15, 1990, make the following correction:

On page 5445, in the third column, under "**SUMMARY**", in the fourth line "relations" should read "regulations".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Adminstration

[Docket No. 85E-0310]

Determination of Regulatory Review Period for Purposes of Patent Extentsion; Lac-Hydrin™

Correction

In notice document 90-8085 beginning on page 13194 in the issue of Monday, April 9, 1990, make the following correction:

On page 13195, in the first column, in the fifth complete paragraph, in the eighth line "May" should read "October".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 90E-0060]

Determination of Regulatory Review Period for Purposes of Patent Extension; ATnativ

Correction

In notice document 90-8086 beginning on page 13193 in the issue of Monday, April 9, 1990, make the following correction:

On page 13193, in the third column, in the eighth line from the end "if" should read "is".

BILLING CODE 1505-01-D

federal register

Friday
April 20, 1990

Part II

Department of Housing and Urban Development

Office of the Assistant Secretary for Community Planning and Development

Federal Property Suitable as Facilities to Assist the Homeless

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

[Docket No. N-90-1917; FR-2606-N-68]

Federal Property Suitable as Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized and underutilized Federal property determined by HUD to be suitable for possible use for facilities to assist the homeless.

EFFECTIVE DATE: April 20, 1990.

ADDRESSES: For further information, contact James Forsberg, room 7262, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 755-6300; TDD number for the hearing- and speech-impaired (202) 755-5965. (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88-2503-OG (D.D.C.), HUD is publishing this Notice to identify Federal buildings and real property that HUD has determined are suitable for use for facilities to assist the homeless. The properties were identified from information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property.

The Order requires HUD to take certain steps to implement section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), which sets out a process by which unutilized or underutilized Federal properties may be made available to the homeless. Under section 501(a), HUD is to collect information from Federal landholding agencies about such properties and then to determine, under criteria developed in consultation with the Department of Health and Human Services (HHS) and the Administrator of General Services (GSA), which of those properties are suitable for facilities to assist the homeless. The Order requires HUD to publish, on a weekly basis, a Notice in the **Federal Register** identifying the properties determined as suitable.

The properties identified in this Notice may ultimately be available for use by the homeless, but they are first subject to review by the landholding agencies pursuant to the court's Memorandum of December 14, 1988 and section 501(b) of the McKinney Act. Section 501(b) requires HUD to notify each Federal agency about any property of such agency that has been identified as suitable. Within 30 days from receipt of such notice from HUD, the agency must transmit to HUD: (1) Its intention to declare the property excess to the agency's need or to make the property available on an interim basis for use as facilities to assist the homeless; or (2) a statement of the reasons that the property cannot be declared excess or made available on an interim basis for use as facilities to assist the homeless.

First, if the landholding agency decides that the property cannot be declared excess or made available to the homeless for use on an interim basis the property will no longer be available.

Second, if the landholding agency declares the property excess to the agency's need, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law and the December 12, 1988 Order and December 14, 1988 Memorandum, subject to screening for other Federal use.

Homeless assistance providers interested in any property identified as suitable in this Notice should send a written expression of interest to HHS, addressed by Judy Breitman, Division of Health Facilities Planning, U.S. Public Health Service, HHS, room 17A-10, 5600 Fishers Lane, Rockville, MD 20857; (301) 443-2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit such written expressions of interest within 30 days from the date of this Notice. For complete details concerning the timing and processing of applications, the reader is encouraged to refer to HUD's **Federal Register** Notice on June 23, 1989 (54 FR 26421), as corrected on July 3, 1989 (54 FR 27975).

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: U.S. Army: HQ-DA, Attn: DAEN-ZCI-P-Robert Conte; room 1E671 Pentagon, Washington, DC 20360-2600, (202) 693-4583; Corps of Engineers: Bob Swieconek, HQ-US Army Corps of Engineers, Attn: CERE-MN, 20 Massachusetts Avenue NW., Washington, DC 20415-1000; (202) 475-2133; U.S. Air Force: H.L. Lovejoy, Bolling AFB, HQ-USAF/LEER, Washington, DC 20332-5000; (202) 767-4191; U.S. Navy: John Carr, Code 2041C, Naval Facilities Engineering Command, 200 Stovall Street, Alexandria, VA 22332; (202) 325-0474; Dept. of Transportation: Angelo Picillo, Deputy Director, Administrative Services & Property Management, DOT, 400 Seventh Street, SW., room 10319D, Washington, DC 20590; (202) 366-4246. (These are not Toll-free numbers.)

Dated: April 13, 1990.

Paul Roitman Bardack,

Deputy Assistant Secretary for Program Policy Development and Evaluation.

Suitable Land (by State)

Georgia

Fort Gordon—Land
Augusta, GA, Co: Richmond
Location: Outside Gate 5 across Highway 1 at Tobacco Road.
Landholding Agency: Army
Property Number: 219013901
Status: Unutilized
Comment: 1.2 acres; subject to easement since 1961 to State of Georgia Highway Department for road right-of-way.

Illinois

Arlington USAR Center
1515 W. Central Road
Arlington Height, IL, Co: Cook
Landholding Agency: Army
Property Number: 219013921
Status: Underutilized
Comment: 6 acres; access subject to negotiation.

New York

Manhattan Beach Housing
Fort Hamilton
Quentin Street Playground/Ball Field
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011619
Status: Excess
Base Closure
Comment: 1/10 of an acre; playground equipment grassy area; most recent use—playground and ball field; scheduled to be vacated 8/15/90.

Suitable Buildings (by State)

Maine

Bldg. 1
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010590
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 2
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010591
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 3
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010592
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 4
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010593
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 5
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010594
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 6
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010595
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 7
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010596
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 8
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010597
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 9
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010598
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 10
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010599
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 11
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010600
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 12
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010601
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 13
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010602
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 14
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010603
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 15
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010604
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Bldg. 16
Family Housing Annex, Loring Air Force Base
U.S. Route #1
Caswell, ME, Co: Aroostook
Landholding Agency: Air Force
Property Number: 189010605
Status: Excess
Comment: 1116 sq. ft.; 1 story frame residence; no utilities; asbestos and radon tests pending; fuel tanks removed; sewage line needs repair.

Michigan

Former C. G. Lightkeeper Sta.
Little Rapids Channel Project
St. Marys River
Sault Ste. Marie, MI, Co: Chippewa
Location: 3 miles east of downtown Sault Ste. Marie.
Landholding Agency: COE
Property Number: 319011573
Status: Excess
Comment: 1411 sq. ft.; 2 story; wood frame on .62 acres; needs rehab; secured area with alternate access.

New York

Manhattan Beach Housing
Fort Hamilton
140 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011574
Status: Excess
Base closure
Comment: 13425 sq. ft.; 3 story concrete/brick/residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
142 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011575
Status: Excess
Base closure
Comment: 13425 sq. ft.; 3 story concrete/brick/residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
146 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011576
Status: Excess
Base closure
Comment: 13425 sq. ft.; 3 story concrete, brick/residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
148 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011577
Status: Excess
Base Closure

Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
150 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011578
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
152 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011579
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
156 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011580
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
158 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011581
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
139 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011582
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
141 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011583
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
145 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011584
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
147 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011585
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
149 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011586
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
151 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011587
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
155 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011588
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
157 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011589
Status: Excess
Base Closure
Comment: 13425 sq. ft.; 3 story concrete/brick residence; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
115 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011590
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
119 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011591
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
121 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011592
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
123 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011593
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
116 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011594
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; one unit has water damage; 2 family duplex; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
120 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011595
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
122 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011596
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
126 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011597
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
130 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011598
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
129 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011599
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
131 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011600
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
133 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011601
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
135 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011602
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
130 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011603
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
132 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011604
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
134 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011605
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
136 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011606
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
162 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011607
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
164 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011608
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
166 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011609
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
170 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011610
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
173 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011611
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
175 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011612
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
177 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011613
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
181 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011614
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
174 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011615
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; severe water damage to units; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
176 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011616
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton
178 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011617
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Manhattan Beach Housing
Fort Hamilton

182 Quentin Street
Brooklyn, NY, Co: Kings
Landholding Agency: COE
Property Number: 319011618
Status: Excess
Base Closure
Comment: 12550 sq. ft.; 2 story brick/concrete residence; 2 family duplex; possible asbestos; scheduled to be vacated 8/15/90.

Pennsylvania

Bldg. 276
Army Depot
J Avenue
New Cumberland, PA, Co: York
Landholding Agency: Army
Property Number: 219013679
Status: Underutilized
Comment: 9300 sq. ft.; 1 story wood frame; secured area with alternate access; most recent use—storage.

Bldg. 501
New Cumberland Army Depot
Mifflin and B Avenue
New Cumberland, PA, Co: York
Landholding Agency: Army
Property Number: 219013898
Status: Unutilized
Comment: 1800 sq. ft.; 1 story concrete block; needs major repair; most recent use—storage.

Bldg. 279
New Cumberland Army Depot
G Avenue
New Cumberland, PA, Co: York
Landholding Agency: Army
Property Number: 219013899
Status: Unutilized
Comment: 2360 sq. ft.; 2 story wood frame; interior gutted in fire drill; most recent use—troop housing.

South Carolina

Bldg. 5485
Marion Avenue
Fort Jackson, SC, Co: Richland
Landholding Agency: Army
Property Number: 219013897
Status: Unutilized
Comment: 6303 sq. ft.; 1 story permanent structure; former heating plant; deteriorated condition.

Unsuitable Land (by State)

California

Mather Air Force Base
SE corner of Mather
Sacramento, CA, Co: Sacramento
Landholding Agency: Air Force
Property Number: 189010609
Status: Unutilized
Base Closure
Reason: Secured Area.

Tennessee

Volunteer Army Ammo. Plant
Chattanooga, TN, Co: Hamilton
Location: Area around VAAP—outside fence in buffer zone.
Landholding Agency: Army
Property Number: 219013889
Status: Unutilized
Reason: Within 2000 ft. of flammable or explosive material, secured area.

Washington

Land
Puffin Island Light House Res.
(See County), WA, Co: San Juan
Landholding Agency: DOT
Property Number: 879010013
Status: Unutilized
Reason: Other.
Comment: Island.

Unsuitable Buildings (by State)

California

Bldg. 590
Oakland Army Base
Oakland, CA, Co: Alameda
Landholding Agency: Army
Property Number: 219013902
Status: Unutilized
Reason: Secured Area.

Bldg. 640 (West End)
Oakland Army Base
Oakland, CA, Co: Alameda
Landholding Agency: Army
Property Number: 219013903
Status: Unutilized
Reason: Secured Area.

Bldg. 640 (North Side)
Oakland Army Base
Oakland, CA, Co: Alameda
Landholding Agency: Army
Property Number: 219013904
Status: Unutilized
Reason: Secured Area.

Bldg. 790
Oakland Army Base
Oakland, CA, Co: Alameda
Landholding Agency: Army
Property Number: 219013905
Status: Unutilized
Reason: Secured Area.

Bldg. 840
Oakland Army Base
Oakland, CA, Co: Alameda
Landholding Agency: Army
Property Number: 219013906
Status: Unutilized
Reason: Secured Area.

Bldg. 3686
Mather Air Force Base
Francis and E Streets
Sacramento, CA, Co: Sacramento
Landholding Agency: Air Force
Property Number: 189010606
Status: Unutilized
Base Closure
Reason: Secured Area.

Bldg. 3494
Mather Air Force Base
Driscoll and F. Streets
Sacramento, CA, Co: Sacramento
Landholding Agency: Air Force
Property Number: 189010607
Status: Unutilized
Base Closure
Reason: Secured Area.

Bldg. 2566
Mather Air Force Base
5th and B Streets
Sacramento, CA, Co: Sacramento
Landholding Agency: Air Force
Property Number: 189010608
Status: Unutilized
Base Closure
Reason: Secured Area.

Georgia

Fort Stewart
Sewage Treatment Plant
Ft. Stewart, GA, Co: Hinesville
Landholding Agency: Army
Property Number: 219013922
Status: Unutilized
Reason: Other
Comment: Sewage treatment.

Maryland

Bldg. 312
SFC Adams Brandt & Reserve Center
700 Ordnance Road B
Baltimore, MD, Co: Anne Arundel
Landholding Agency: Army
Property Number: 219013881
Status: Unutilized
Reason: Other
Comment: Collapsed roof/supporting beams cracked.

North Carolina

Bldg. 12
Sunny Point
Military Ocean Terminal
Southport, NC, Co: Brunswick
Landholding Agency: Army
Property Number: 219013889
Status: Unutilized
Reason: Within 2000 ft. of flammable or explosive material, Secured Area.

New Jersey

Bldg. 13
Military Ocean Terminal
Bayonne, NJ, Co: Hudson
Location: Foot of 32nd Street and Route 169.
Landholding Agency: Army
Property Number: 219013890
Status: Unutilized
Reason: Floodway, Secured Area.

Bldg. 14
Military Ocean Terminal
Bayonne, NJ, Co: Hudson
Location: Foot of 32nd Street and Route 169
Landholding Agency: Army
Property Number: 219013891
Status: Underutilized
Reason: Within 2000 ft. of flammable or explosive material, Floodway, Secured Area.

Bldg. 15A
Military Ocean Terminal
Bayonne, NJ, Co: Hudson
Location: Foot of 32nd Street and Route 169
Landholding Agency: Army
Property Number: 219013892
Status: Unutilized
Reason: Floodway, Secured Area.

Bldg. 41
Military Ocean Terminal
Bayonne, NJ, Co: Hudson
Location: Foot of 32nd Street and Route 169
Landholding Agency: Army
Property Number: 219013893
Status: Underutilized
Reason: Floodway, Secured Area.

Bldg. 100
Military Ocean Terminal
Bayonne, NJ, Co: Hudson
Location: Foot of 32nd Street and Route 169
Landholding Agency: Army
Property Number: 219013894
Status: Unutilized

Reason: Floodway, Secured Area.

Bldg. 110
Military Ocean Terminal
Bayonne, NJ, Co: Hudson
Location: Foot of 32nd Street and Route 169
Landholding Agency: Army
Property Number: 219013895
Status: Underutilized
Reason: Floodway, Secured Area.

Bldg. 111
Military Ocean Terminal
Bayonne, NJ, Co: Hudson
Location: Foot of 32nd Street and Route 169
Landholding Agency: Army
Property Number: 219013896
Status: Unutilized
Reason: Floodway, Secured Area.

New York

Bldg. R–95
Naval Station
207 Flushing Avenue
Brooklyn, NY, Co: Kings
Landholding Agency: Navy
Property Number: 779010256
Status: Unutilized
Base Closure
Reason: Secured Area.

Bldg. RD
Naval Station
207 Flushing Avenue
Brooklyn, NY, Co: Kings
Landholding Agency: Navy
Property Number: 779010257
Status: Underutilized
Base Closure
Reason: Secured Area.

Bldg. 305
Naval Station
207 Flushing Avenue
Brooklyn, NY, Co: Kings
Landholding Agency: Navy
Property Number: 779010258
Status: Underutilized
Base Closure
Reason: Secured Area.

Washington

Bldg. 6072
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013882
Status: Unutilized
Reason: Secured Area.

Bldg. 6E50
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013883
Status: Unutilized
Reason: Secured Area.

Bldg. 10A50
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013884
Status: Surplus
Reason: Secured Area.

Bldg. PA 1025
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013885
Status: Unutilized
Reason: Secured Area.

Bldg. PA 1027
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013886
Status: Unutilized
Reason: Secured Area.

Bldg. PA 1026
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013887
Status: Excess
Reason: Secured Area.

Bldg. P3908
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013888
Status: Excess
Reason: Secured Area.

Bldg. DOODSA
Fort Lewis
(See County), WA, Co: Thurston
Landholding Agency: Army
Property Number: 219013900
Status: Excess
Reason: Secured Area.

Bldg. T01213
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013907
Status: Excess
Reason: Secured Area.

Bldg. TO2412
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013908
Status: Excess
Reason: Secured Area.

Bldg. TO4523
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013909
Status: Excess
Reason: Secured Area.

Bldg. TO7927
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013910
Status: Excess
Reason: Secured Area.

Bldg. TO8973
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013911
Status: Excess
Reason: Secured Area.

Bldg. TO8974
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013912
Status: Excess
Reason: Secured Area.

Bldg. TO8975
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013913
Status: Excess
Reason: Secured Area.

Bldg. TO9440
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013914
Status: Excess
Reason: Secured Area.

Bldg. TO9441
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013915
Status: Excess
Reason: Secured Area.

Bldg. TO9450
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013916
Status: Excess
Reason: Secured Area.

Bldg. TO9460
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013917
Status: Excess
Reason: Secured Area.

Bldg. 8982
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013918
Status: Excess
Reason: Secured Area.

Bldg. 8983
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013919
Status: Excess
Reason: Secured Area.

Bldg. 8985
Fort Lewis
(See County), WA, Co: Pierce
Landholding Agency: Army
Property Number: 219013920
Status: Unutilized
Reason: Secured Area.

Wisconsin

Bldg. 202
440 Tactical Airlift Wing
300 E. College Avenue, Gen. Mitchell IAP
Milwaukee, WI, Co: Milwaukee
Landholding Agency: Air Force
Property Number: 189010610
Status: Unutilized
Reason: Within 2000 ft. of flammable or explosive material.

Universe of Properties:
Total=116
Suitable=69
Suitable Buildings=66

Suitable Land=3
Unsuitable=47
Unsuitable Buildings=44
Unsuitable Land=3
Number of Resubmissions=0

[FR Doc. 90-9039 Filed 4-19-90; 8:45 am]
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federal register

Friday
April 20, 1990

Part III

Department of Transportation

Federal Aviation Administration

14 CFR Parts 13 and 14

Rules of Practice for FAA Civil Penalty Actions; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 13 and 14

[Docket No. 25690; Amdt. No. 13-20; Amdt. No. 14-1]

Rules of Practice for FAA Civil Penalty Actions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule adopts changes to the rules of practice in FAA civil penalty actions not exceeding $50,000 for a violation of the Federal Aviation Act of 1958, or of any rule, regulation, or order issued thereunder, and in actions regardless of amount for a violation of the Hazardous Materials Transportation Act, or any rule, regulation, or order issued thereunder. In response to a commitment made to the Subcommittee on Aviation of the House Committee on Public Works and Transportation, the FAA issued a notice of proposed rulemaking soliciting comment on specific objections to the rules of practice raised by individuals and by organizations representing air carriers, airport operators, and pilots. In addition to soliciting written comments, the FAA also held a public meeting to allow interested persons to comment orally on the proposed changes and several policy issues.

The final rule is intended to fulfill the agency's commitment to the Subcommittee, to respond to the concerns of the aviation community, and to adopt specific changes to the rules of practice recommended by the Committee on Adjudication of the Administrative Conference of the United States. The changes adopted herein will apply to all pending cases as explained more fully in the preamble. The FAA also issued concurrently with this final rule a notice of proposed rulemaking, setting forth the rules of practice in their entirety; that notice is published in a separate part of today's Federal Register.

DATES: *Effective date:* April 20, 1990.

Effective date suspended: April 20, 1990, until further notice published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Denise Daniels Ross, Special Counsel to the Chief Counsel (AGC-3), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3773

SUPPLEMENTARY INFORMATION

Availability of the Final Rule

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center (APA-430), 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the amendment number of this final rule. Persons interested in being placed on the mailing list for future NPRMs or final rules also should request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Background

On August 31, 1988, by final rule, the Federal Aviation Administration (FAA) promulgated rules of practice for civil penalty actions conducted under a statutory amendment (Pub. L. 100-223; December 30, 1987) to the Federal Aviation Act of 1958. 53 FR 34646; September 7, 1988. That statutory amendment empowers the Administrator to assess civil penalties, not to exceed $50,000, for violations of the Federal Aviation Act and the FAA's safety regulations promulgated thereunder. Under this authority, a civil penalty may be assessed only after notice and an opportunity for a hearing on the record. In the final rule, the FAA invited interested persons to comment on the rules of practice.

On March 17, 1989, the FAA issued a detailed disposition of the comments submitted on the rules of practice, responding to the commenters' objections to specific provisions of the rules of practice. 54 FR 11914; March 22, 1989. In the disposition of comments, the agency explained the purpose of the rules of practice and discussed its expectations of the manner in which cases would proceed under those rules.

The Air Transport Association of America filed a petition for review in the United States Court of Appeals for the District of Columbia (No. 89-1195), challenging the agency's promulgation of the final rule and the rules of practice for civil penalty actions. Several persons in their individual capacity, the Aircraft Owners and Pilots Association, the National Air Carrier Association, the Air Line Pilots Association, and America West intervened in support of the Air Transport Association's petition for review. As the agency stated, this rulemaking was not intended to address the legal issues or arguments involved in that case. Nevertheless, the preamble to this rule discusses legal issues to the extent they were raised by the commenters.

The Subcommittee on Aviation of the House Public Works and Transportation Committee held a hearing on November 15, 1989, to consider an extension of the FAA's authority to assess civil penalties administratively. The FAA and representatives of the aviation industry, among others, testified about the FAA's authority and the rules of practice implementing that authority. On November 22, 1989, shortly before Congress concluded its legislative session, a 4-month extension of the FAA's authority was passed. The President signed that bill into law on December 15, 1989 (Pub. L. 101-236). Under that law, the FAA's authority to assess civil penalties will expire on April 30, 1990, unless further extended by Congress.

At the conclusion of the congressional hearing, the FAA promised to issue an NPRM, soliciting public comment on proposals to address several objections to the rules of practice raised by those who commented previously on the rules and who testified at the hearing. The FAA issued the NPRM on February 28, 1990. 55 FR 7980; March 6, 1990. In light of the significant interest associated with the civil penalty program, the FAA took extraordinary steps to ensure wide and prompt distribution of the NPRM, including a mass mailing of copies to aviation industry groups and those persons who had commented previously on the rules of practice. The FAA also delivered copies of the NPRM to several members of Congress who expressed an interest in the civil penalty program or whose constituents had written to Congress about the program.

On March 13, 1990, the Chairman of the Administrative Conference of the United States (hereinafter Administrative Conference) transmitted to Congress the recommendation of the Committee on Adjudication regarding extension of the FAA's civil penalty assessment authority. The Committee's primary conclusion is that the civil penalty assessment program should be continued, albeit with some recommended procedural modifications to the rules of practice. The Committee recommended permanent authorization of a system for administrative imposition of civil penalties for violations of the Federal Aviation Act and the regulations. Recommendation of the Committee on Adjudication of the Administrative Conference at 1 (March 8, 1990) (hereinafter Adj.Com.Rec.). The changes proposed in the NPRM and adopted herein address the procedural modifications suggested by the

Committee on Adjudication. Adj.Com.Rec. at 4 (March 8, 1990).

The Chairman also transmitted the report on the program and the rules of practice requested by the agency and prepared for the Office of the Chairman by Professor Richard Fallon of Harvard Law School (hereinafter "Fallon Report"). Professor Fallon's report supports continuation of a program of administratively-imposed civil money penalties for violations of aviation safety regulations. Professor Fallon, however, also suggested that responsibility for adjudication of the FAA's civil penalty cases should be transferred to the National Transportation Safety Board (NTSB). Professor Fallon also recommended specific changes to the rules of practice if the authority for administrative assessment of penalties is retained within the FAA. This final rule also addresses Professor Fallon's recommendations regarding the rules of practice.

The Committee on Adjudication held two public meetings to consider Professor Fallon's report. In the words of Marshall J. Breger, Chairman of the Administrative Conference, there was "vigorous participation and comment by affected groups" during the meetings. Chairman Breger's Letter to Congress at 1 (March 13, 1990). As noted by the Chairman, the Committee on Adjudication specifically addressed the issue of the appropriate forum to adjudicate FAA's civil penalty actions. After listening to comment from the aviation community and the agency, and after some deliberation, the Committee on Adjudication "was unable to decide whether a transfer of such responsibilities was warranted." The Committee noted that "[t]he Conference may at some time in the future address this issue if the program continues." Chairman Breger's Letter to Chairman Oberstar at 2 and 3 (March 26, 1990).

On April 13, 1990, the U.S. Court of Appeals for the District of Columbia issued its decision in *Air Transport Association* v. *Department of Transportation*. In a 2–1 decision, the court agreed with the petitioner that the FAA was obliged by section 553 of the Administrative Procedure Act to provide notice and comment before the rules of practice in civil penalty actions were promulgated. The court held that the procedural challenge to promulgation of the rules of practice in August 1988 was ripe for review and granted the petition for review on that ground. The court expressed no opinion on the ripeness or the merits of the Air Transport Association's several substantive challenges to the rules of practice.

The court ordered the FAA "not to initiate further prosecutions * * * until the agency has engaged in further rulemaking in accord with section 553." Slip op. at 21. In the exercise of its "equitable remedial powers," the court stated, "[T]he FAA is free to hold *pending* cases in abeyance while it engages in further rulemaking. If and when the FAA promulgates a final rule for adjudication of administrative penalty actions, it may then resume prosecution of these cases." *Id.* at 20–21.

In accordance with the court's decision, all FAA prosecuting attorneys will hold in abeyance all civil penalty cases initiated under the rules of practice and will not initiate any notice of proposed civil penalty until further notice. They also will not proceed even with informal procedures, such as informal conferences, until further notice. Chief Administrative Law Judge Mathias, of the Office of Hearings of the Department of Transportation, has also requested the administrative law judges to postpone hearings that had been scheduled and not to schedule any future hearings until further notice. The FAA and the Office of Hearings of the Department of Transportation will make every effort to notify all persons whose cases are pending of the court's decision, whether or not a hearing has been held, scheduled, or not yet scheduled.

In its opinion, the court stated that "Insofar as the FAA's pending notice of proposed rulemaking [issued on February 28, 1990 (55 FR 7980; March 6, 1990)] seeks public comment on the individual Rules that the agency intends to amend the agency may rely on the outcome of that rulemaking as a partial fulfillment of this mandate." Slip op. at 20. Concurrently with the publication of this final rule based on the February 28 NPRM, the FAA has published in a separate part of today's **Federal Register** another NPRM, setting forth the rules of practice in their entirety. Those rules of practice, published in the NPRM for comment, include the changes adopted pursuant to this final rule. In light of the court's decision, the FAA has suspended the effective date of the changes to the rules of practice amended by this final rule, pending further notification in the **Federal Register**.

Purpose of the Final Rule

This document is intended to complete the actions pledged by the FAA to the Subcommittee on Aviation of the House Committee on Public Works and Transportation at the hearing held on November 15, 1989. Pursuant to this commitment and in order to address the comments submitted on the rules and proposed changes, the FAA is amending the rules of practice either as proposed, as modified after review of the comments, or as suggested by different commenters.

As stated previously, the FAA believes that the rules of practice provide significant and substantial procedural safeguards and meet all requirements governing the procedural rights of persons and entities charged with violations.

Administrative adjudication of civil penalties is an effective and expeditious means of prosecuting aviation safety and security violations, and, in particular, is a far more efficacious procedure than one in which penalties may be adjudicated only in a U.S. district court. The authority granted by Congress contributes to the maintenance and improvement of aviation security and safety by providing swifter, more certain enforcement and increased accountability for violations of critical safety and security regulations.

Because the authority given to the Administrator was extended only temporarily, the FAA proceeded expeditiously with this rulemaking action. The aviation community's major objections to the rules of practice were directed at the issues raised in the NPRM. To the extent that swift rulemaking action addresses those concerns, the FAA believes that the public interest is served by issuing this final rule to adopt the amendments to the rules of practice contained herein, although the effective date of this final rule has been stayed pursuant to the court's order.

Discussion

Twenty-two comments were submitted on or before March 30, 1990, the closing date for receipt of comments specified in the NPRM. Three comments were received after the close of the comment period. The FAA considered all of these comments, including the material in the late-filed submissions.

The commenters include representatives of aviation entities regulated by the FAA, such as: The Air Transport Association of America (ATA); the National Business Aircraft Association (NBAA); Rocky Mountain Helicopters, Inc.; the National Air Transportation Association (NATA); the Experimental Aircraft Association (EAA); the National Air Carrier Association (NACA); the Aircraft Owners and Pilots Association (AOPA); the Airport Operators Council

International (AOCI) and the American Association of Airport Executives (AAAE) (joint comments); the Air Line Pilots Association (ALPA); the Allied Pilots Association (APA); America West Airlines, Inc. (endorsing the comments submitted by ATA); the Tobacco Institute; the Regional Airline Association (RAA); American Airlines; the NTSB Bar Association; Alaska Airlines; and Eastern Airlines. Several individuals and attorneys whose practice includes aviation-related enforcement actions also submitted comments on the NPRM.

Before the FAA issued the NPRM, the complaints of the aviation community focused on several areas of the rules of practice perceived to be biased in favor of the prosecution, to afford less process than desired in on-the-record hearings, or simply contrary to the interests of alleged violators. In this document, the FAA discusses the amendments to the rules of practice that (1) respond to the specific objections raised by various members and committees of Congress, by those who have commented previously, by those who testified at the hearing, and by those who commented on the NPRM and spoke at the public meeting; and (2) address the recommendations of Professor Fallon and the Committee on Adjudication.

1. Complaint

Objections had been raised that issuing an "order of civil penalty" as the complaint to initiate a hearing creates an apparent presumption of guilt before any hearing and may discourage alleged violators from contesting the allegations set forth in the complaint. In the NPRM, the FAA proposed to change the designation "order of civil penalty" to "complaint" throughout the rules of practice and redefine "complaint" in the definitions section. The FAA also proposed to revise § 13.16(h) to reflect that the agency will issue a "complaint" if a hearing is requested pursuant to the rules.

All but one of the commenters who address this issue agree with the FAA's proposal to change the designation of "order of civil penalty" to "complaint." In its support of the proposal, RAA notes that the word "complaint" is more descriptive of the actual nature of the document filed by the agency. Thus, the FAA is adopting the change as proposed. This change is consistent with the recommendation made by the Committee on Adjudication. Adj.Com.Rec. at 5 (March 8, 1990).

NATA also proposes that the FAA further change the definition of "complaint" to read, in part: "an alleged regulatory violation resulting in filing of a complaint with the Hearing Docket." Because NATA did not further explain its proposal, the FAA assumes that NATA wants the definition of complaint to show clearly that it contains only allegations of a violation of the Federal Aviation Act, the Hazardous Materials Act, or the regulations promulgated pursuant to those acts. The FAA agrees that such a change would clarify the definition and is amending the definition of "complaint" in § 13.202 (by adding the italicized language) so that the definition reads as follows:

> "Complaint" means a document issued by an agency attorney *alleging a violation of* the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder, which has been filed with the Hearing Docket after a hearing has been requested pursuant to § 13.16(e)(3) or § 13.16(g)(3) of this subpart.

In the NPRM the FAA proposed to modify § 13.16(l) and § 13.232 (a) and (d) to provide that an administrative law judge would issue a decision "that *affirms, modifies, or reverses* the allegations contained, or the civil penalty sought, in a complaint." ALPA suggests that the italicized terms be deleted, insofar as they refer to an administrative law judge's findings on the allegations contained in the complaint, because these terms are "customarily used when there has already been a decision or findings by an adjudicative body, which are being reviewed by a higher authority." ALPA also raises this concern in its comment regarding modification of a civil penalty. To address this concern, the agency is amending those sections to ensure further that the allegations in the complaint reflect only the agency's belief that it has sufficient evidence to bring the complaint and proceed with the civil penalty action. Thus, § 13.16(l) and § 13.232 (a) and (d) are revised further to provide that the administrative law judge would issue an initial decision that "contains findings or conclusions on the allegations contained, and the civil penalty sought, in the complaint." The FAA believes that this revision addresses ALPA's concern that the language of the previous rule might be read as according more "weight and validity" to the allegations and the proposed penalty than intended.

2. Separation of Functions

Many commenters continue to object to the separation of functions provided in the rules of practice, even if amended as proposed by the agency in the NPRM. Some of these commenters believe that placing prosecution and adjudication functions within the same agency creates an inherent problem of fairness or bias, that is eliminated only by transfer of adjudication either to the Federal courts or to the NTSB. Other commenters do not object to in-house adjudication *per se*, but recommend further separation to ensure a fair system of adjudication. Some recommend restrictions on the Administrator, some on the Chief Counsel, and some on the Assistant Chief Counsel for Litigation.

The agency has on four previous occasions explained the basis for the separation of functions contained in the rules of practice; on the last three occasions, it has responded to concerns that the separation is inadequate. On January 10, 1989, the agency announced how the separation would be implemented within the agency, and specifically within the Office of Chief Counsel. 54 FR 1335; January 13, 1989. On March 17, 1989, in its disposition of comments, the agency responded to the concerns expressed by commenters to the final rule issued on August 31, 1988. 54 FR 11914; March 22, 1989. On October 27, 1989, in the preamble to the final rule implementing the Equal Access to Justice Act (EAJA), the agency responded to similar concerns expressed by four commenters. 54 FR 46196; November 1, 1989.

In the NPRM, the agency proposed specifically to amend the rules of practice in the respects recommended by Professor Fallon. Professor Fallon recommended:

> [T]he FAA should consider expanding the prohibitions expressly stated within its separation-of-functions rule to incorporate the [Administrative Procedure Act's] prohibition against advice-giving, either to an [administrative law judge] or to the agency decisionmaker, by lawyers who have performed relevant investigative or prosecutorial functions.

Fallon Report at 42–44 (March 1990). In the notice, the agency proposed to amend § 13.203 to include the separation announced in the **Federal Register** in January 1989 and to prohibit agency employees who participate in an investigation from advising any person who performs adjudicative functions in a case, or a factually-similar case. 55 FR 7982; March 6, 1990.

The proposed rule satisfies the recommendation of the Committee on Adjudication of the Administrative Conference, which similarly suggests that the rules of practice "should make clear that employees with investigatory or prosecutorial responsibilities in a case in this program will not

communicate with the administrative law judge or agency decisionmaker in that case or a factually related case, except as counsel or a witness in the public proceedings." Adj.Com.Rec. at 5 (March 8, 1990).

Several commenters (RAA, AOCI and AAAE, AOPA) support the proposed changes, and no commenters object to them so far as they go. Therefore, to conform the rules of practice to the recommendations of Professor Fallon and the Committee on Adjudication, and to promote the appearance of fairness, the agency adopts these changes in this final rule. As amended, the rules of practice comply fully with the Administrative Procedure Act. Chairman Breger's Letter to Chairman Oberstar at 3 (March 26, 1990.) (Copies of Chairman Breger's letter to Chairman Oberstar, and a related letter from AOPA to Chairman Oberstar, have been placed in the docket. Copies of a similar letter from Chairman Breger, dated March 14, 1990, to Chairman Oberstar, and a related letter from a private aviation attorney to Chairman Oberstar, also have been placed in the docket.)

Much of the criticism of the current and proposed separation of functions concerns the responsibilities of the Chief Counsel. Some commenters believe the Chief Counsel should play no role in advising the Administrator. Others believe that if the Chief Counsel continues to advise the Administrator, he should play no role whatsoever in the prosecution of a case from its inception or in the setting of enforcement policy.

Several commenters continue to object to the responsibility of the Assistant Chief Counsel for Litigation under the rules of practice to advise the decisionmaker, and to function as the decisionmaker in a few minor procedural matters pursuant to a delegation from the Administrator.

Several commenters object to the Administrator's role in setting enforcement policy. This objection is tantamount to opposing any administrative imposition of civil penalties, regardless of the nature of the internal separation. Because it reflects the most fundamental disagreement with the separation of functions established within the FAA, this last objection will be addressed first.

a. *The view that any separation of functions is inadequate so long as both prosecutorial and adjudicative functions are housed within one agency.* As previously noted, some commenters are opposed to any combination of prosecutorial and adjudicative functions within the FAA. Several oppose a legislative extension of the agency's authority to assess civil penalties administratively primarily because of this combination of functions, and urge that the authority be transferred to the NTSB. These commenters believe strongly that in-house adjudication is inherently wrong. APA states that it amounts to an "inherent intrusion on procedural fairness." Another commenter argues that "Nothing is more fundamentally unfair than to allow one party to litigation to determine the propriety of its actions in a case." EAA writes, "The new attempts to separate functions of the prosecutor and the decision-maker are insignificant as long as both of these functions remain within the same chain of command." EAA's representative at the public meeting stated, "Fundamentally we are opposed to the concept of allowing the FAA to be the final arbiter as the final decisionmaker in these cases." NBAA concludes: "The separation of function issue cannot be resolved through any Chinese Wall no matter how broad or temporal in its coverage * * *. The only realistic solution to this issue is to allow a truly independent organization which has no investment in the correctness of the legal interpretation or the existence of the facts to hear cases and their appeals."

These objections are expressed in both legal as well as policy terms. A representative comment is the following from a private attorney:

> There is serious concern as to the constitutionality of the current administration of the [Program] in that the FAA has sole responsibility for the investigatory, prosecutorial and ad- judicatory functions of the Program and that, as a result, those charged with a violation and against whom the imposition of civil penalties are sought, are denied due process, and specifically, the opportunity for a fair and impartial hearing and appeal.

While the agency recognizes the sincerity with which these concerns have been expressed in this rulemaking and in previous submissions, the FAA believes these concerns are without substantive merit.

It has long been settled that placement of prosecutorial and adjudicative functions within the same agency does not violate principles of fairness or due process embedded in the U.S. Constitution. There are now over 200 statutes authorizing the assessment of civil penalties in which Congress has entrusted the prosecution and adjudication to one administrative agency. As the Chairman of the Administrative Conference has stated, "Such a system has never been held to violate basic principles of fairness or due process." Chairman Breger's Letter to Chairman Oberstar at 2 (March 26, 1990). "Although at least eleven Supreme Court opinions have dealt with problems about separation of functions, the Court has never held a system of combined functions to be a violation of due process." K. Davis, 3 *Administrative Law Treatise* 343 (2d ed. 1980). Professor Fallon states, "Today, there should be little doubt about the constitutionality of administrative assessment of civil money penalties for violations of the Federal Aviation Act and its implementing regulations." Fallon Report at 17 (March 1990).

Indeed, in his *1959* hornbook entitled *Administrative Law Text*, Professor Davis, one of the preeminent administrative law scholars in this country, wrote:

> We have moved well beyond the early crude thinking that failed to recognize that functions can be adequately separated within a single agency; we now recognize that an organization can properly perform inconsistent functions so long as the parts of the organization are kept sufficiently separate.

K. Davis, *Administrative Law Text* 243 (1959).

Administrative adjudication has long been advocated by the Administrative Conference as an expeditious, efficient, and effective, yet fair system of enforcing civil penalty regulatory schemes. The Administrative Conference first endorsed in-house adjudication in 1972. 1 CFR 305.72–6. Since that time, the statutes authorizing administrative adjudication have proliferated, to the point where today it is widely recognized as the standard, traditional method for civil penalty adjudication within the Federal government. The view expressed fervently by several commenters that the combination of prosecutorial and adjudicative functions within a single agency such as the FAA constitutes an inherent violation of basic constitutional norms is no longer considered a serious proposition of law.

b. *The view that the combination of adjudication and policymaking functions in the Administrator violates principles of fairness.* Two commenters object that if the Administrator is the decisionmaker under the rules of practice, he should have no role in setting enforcement policy. The representative of American Airlines at the public meeting stated, "If the Administrator is to be the final decisionmaker then he cannot be involved or should not be involved in the policies which lead to the initiation of the cases before him." American's written comments conclude that the "dual capacity of setting policy for the

agency *and* acting as appellate judge in cases brought to enforce the Administrator's policies . . . may create an appearance of conflict for the Administrator qua adjudicator."

NBAA believes that the agency's organizational structure and lines of authority make it

> difficult or impossible for the Administrator and his Counsel to initiate enforcement emphasis programs and to remain objective in their review of those same cases when they are appealed to the Administrator. It defies logic to believe that when the Administrator orders field personnel to pursue vigorously a certain set of cases, the Administrator's judgment on the law and the merits will be totally dispassionate when the very same fact pattern, which his original guidance indicated was a problem, is returned to him for review. It is axiomatic to postulate that he will be forced to affirm an action which his initial instructions caused to happen; to do otherwise would be to send a message which contradicts the Administrator's initial policy directive. Even if this is not the case, the perception it gives will taint the whole process.

These comments are fundamentally at odds with law and sound public policy. NBAA' s comments use the terms "programs" and "cases" interchangeably, and blur the distinction between fact, law and policy, without recognizing the basis for the separation of functions required by the Administrative Procedure Act. If read literally, these comments could call into question the integrity of the Administrator's discharge of his responsibilities.

The purpose of the requirement of separation of functions is to ensure a fair hearing by "some protection of the judging function." K. Davis, 3 *Administrative Law Treatise* 369 (2d ed. 1980). Fairness demands that the judicial function be free of improper influence. Under the rules of practice, the judging function reposed in administrative law judges is fully protected; indeed, as the Chairman of the Administrative Conference has noted, "the FAA program actually contains one form of separation of functions not found in most civil penalty regimes[:] * * * the [administrative law judges] who preside at the hearings in FAA civil penalty cases do not work for the FAA." Chairman Breger's Letter to Chairman Oberstar at 2 (March 26, 1990).

Adjudication is not rendered unfair because the adjudicator—either the administrative law judge or the Administrator—has previously formed an opinion of law or policy that may affect the outcome of a case before the adjudicator. What is required is impartiality in the determination of facts, the credibility of witnesses, and the application of the law to a particular set of circumstances. See K. Davis, 3 *Administrative Law Treatise* 371–389 (2d ed. 1980). The Administrator's prior pronouncements of agency enforcement policy, even should they affect a case brought before him, in no way render the Administrator unfit to decide the case fairly. Indeed, it is incumbent even on administrative law judges to apply faithfully the law and policy set forth as agency policy by the head of the agency. As Professor Bruff states, "Everyone agrees that [administrative law judges] must follow their agency's regulations and published policies as well as the statutes and caselaw." *"Restructuring Judicial Review in Administrative Law,"* at 22. (September 1, 1989) (draft report prepared for Federal Courts Study Committee and the Administrative Conference). See also, Zwerdling, *Reflections on the Role of an Administrative Law Judge, 25* Ad.L.Rev. 9, 12–13 (1973) ("Once we have stressed the importance of maintaining the administrative law judge's independence, however, the other side of the coin is recognition that he is governed and bound by his agency's rulings and directives * * *."). So it hardly seems unfair to the respondent that the head of the agency, on review of an administrative law judge's initial decision, applies that law or policy.

The Supreme Court's statement in *Morgan* v. *United States*, 313 U.S. 409, 421 (1941), is apropos.

> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

This reasoning explains the exception of "a member or members of the body comprising the agency" from the separation of functions requirement of the Administrative Procedure Act. 5 U.S.C. 554(d)(2)(C). Simply put, the Administrator is not subject to the separation of functions requirement of the Administrative Procedure Act. Logically, this exception follows from the very nature of administrative agencies and of administrative adjudication. In an agency, the setting of policy is ultimately the responsibility and function of the head of the agency; administrative adjudication assumes that the final decisionmaker is the agency head or tribunal. Suggesting, as do American Airlines and NBAA, that the Administrator ought to be put to a choice, either to set policy or to adjudicate, runs counter to longstanding, previously-unquestioned administrative practice, and would be inconsistent with sound public policy.

The pre-adjudication actions, which NBAA believes prejudice the Administrator's capacity to decide cases "dispassionately," consist of "initiat[ing] enforcement emphasis programs," "order[ing] field personnel to pursue vigorously a certain set of cases," and issuing "guidance" and "policy directives." These activities are general and abstract, not specific to a case or person. They in no way interfere with the judging function; indeed, as noted above, they may properly inform the judging function. Even assuming that policy or guidance is issued as a result of a specific incident, or "fact pattern," there is nothing wrong with the Administrator's review of a subsequent case that fits the policy or guidance. An adjudicator must still find facts, and reach conclusions of law, in each case according to the testimony and other evidence in the record. Those findings and conclusions are subject to judicial scrutiny for reasonableness.

c. *The view that the Chief Counsel's role in (1) the general supervision of agency attorneys, (2) making and executing enforcement policy, or (3) participating in a case before it is initiated, contravenes basic principles of fairness and the Administrative Procedure Act.* Several comments focus on the Chief Counsel's responsibilities under the rules of practice; most recommend specifically that the Chief Counsel not participate in advising the decisionmaker. Should the Chief Counsel continue to advise the decisionmaker, ATA, ALPA and one private attorney object to any role played by the Chief Counsel in the enforcement process, at any stage of a case.

Under § 13.203, the separation of functions is triggered by the issuance of a notice of proposed civil penalty. Thus, in theory, as ATA fears, the Chief Counsel "could advise the decisionmaker in a case that he caused to be filed!" ATA recommends that the so-called "temporal clause" of § 13.203 be removed.

As the agency explained in its disposition of comments following issuance of the final rule, the temporal clause is patterned after the separation of functions provision in Departmental regulations governing hearings cases brought under 14 CFR chapter 2, parts 200–399. "In both sets of rules, the separation of functions is effected only after an enforcement case is initiated." 54 FR at 11915; March 22, 1989. Under DOT rules, the separation "applies after

the initiation of a hearing or enforcement case," 14 CFR 300.4; a case is "initiated" upon the filing of a complaint.

The current rule also is consistent with the Administrative Procedure Act.

> Under the Act, the same individual may "accuse," in the sense of deciding that proceedings should be instituted, and may also judge. This is true whether the individual is a head of an agency or a subordinate.

K. Davis, *Administrative Law Text* 242 (1959). "The Act does not and probably should not forbid the combination with judging of instituting proceedings[.]" *Id.* at 244. Asimow, *When the Curtain Falls: Separation of Functions in Federal Administrative Agencies*, 81 Colum.L.Rev. 759, 766–768, 770–772 (1981).

The agency appreciates the concern that the Chief Counsel is permitted under the current rules of practice to be involved in some capacity with a case before a notice of proposed civil penalty is issued, and thereafter to advise the decisionmaker in that case. Although this has not happened in the agency's administration of this program, and the Chief Counsel has stated that he would recuse himself from advising the decisionmaker in any case in which he participated before the notice was issued, the agency is amending further § 13.203(b) by removing the last sentence to alleviate the commenters' concern.

Thus amended, the rule will not preclude the participation of the Chief Counsel in exercising prosecutorial discretion before the initiation of a particular enforcement case that ultimately is initiated under the civil penalty authority. In some situations, a matter may be referred to the Office of Chief Counsel with a recommended sanction of certificate action, or a civil penalty in excess of $50,000. In certain significant cases, the matter may be referred specifically to the Chief Counsel for his review and approval to initiate. In such cases, it does no violence to the separation of functions provided under the rules or required by the Administrative Procedure Act to allow the Chief Counsel to exercise prosecutorial discretion in determining the appropriate type and amount of sanction. Should the Chief Counsel determine that a lower civil penalty is more appropriate than one in excess of $50,000 or a certificate action, and thereafter a notice of proposed civil penalty is issued, the Chief Counsel will recuse himself from advising the decisionmaker in that case or a factually-related case, as required by § 13.203(b) and the Administrative Procedure Act.

A more fundamental objection is that the Chief Counsel cannot provide "dispassionate counsel" to the decisionmaker because of the Chief Counsel's primary role in setting and carrying out enforcement policy. NBAA states:

> The FAA Chief Counsel is the chief legal officer of the agency. His advice is not only sought as a predicate to any enforcement program; it is a legal prerequisite to such an agency action. The Chief Counsel routinely participates in the Administrator's highest councils and through his voicing of legal and policy opinions contributes significantly to the agency's enforcement policy and priorities.

The agency's response to the objection to the Administrator's involvement in creating enforcement policy applies also to the objection to the Chief Counsel's involvement. Fair adjudication is not compromised by previous involvement in policymaking by the decisionmaker or those who advise the decisionmaker. The fundamental distinction between fact and policy is captured by the Administrative Procedure Act's provision on separation of functions, which is addressed to a case or a "factually-related case." (Similar is the prohibition on administrative law judges from "consulting a person or party on a *fact* in issue, unless on notice * * *.") 5 U.S.C. 554(d)(1). Professor Asimow states:

> In my view, the [Administrative Procedure Act's] language is dispositive; by itself, an institutional tie to an adversary does not make one an adversary * * *. Inclusion of the words "in a case" limits the statute to those persons with personal involvement in the particular case under adjudication or one that is factually related.

81 Colum.L.Rev. at 774. Professor Fallon notes that an earlier ATA proposal "appears to go beyond the [Administrative Procedure Act] by forbidding the Chief Counsel to perform any investigative or prosecutorial functions, or to supervise employees engaged in such functions, at any stage in any case." Fallon Report at 44 n.234 (March 1990).

Removing the Chief Counsel from advising the decisionmaker would deprive the Administrator of the counsel of the senior legal official of the agency, to the potential detriment of sound, fair, and consistent decisionmaking. Resort by agency heads to senior advisors, such as an agency's senior legal official, is entirely appropriate and should be encouraged. It was contemplated by the drafters of the Administrative Procedure Act. The 1947 *Attorney General's Manual on the Administrative Procedure Act*, at 56–57, generally considered to be the best contemporaneous construction of the Act, stated why this is so:

> The expertise of an administrative agency is not limited to the heads of the agency; it includes also the staff of specialists through whom and with whose assistance most of the agency's functions are carried on. The issues in adjudicatory cases, while frequently less complex and with narrower policy implications than are often involved in rule making, present in many cases difficult questions of law and policy * * *. In determining such issues, agency heads have consulted with their principal advisors and specialists. Indeed, it is clearly in the public interest that they continue to do so.

The *Attorney General's Manual* uses an agency's general counsel as an example of this advice-giving, noting its permissibility so long as the counsel's office staff is organized so that individuals engaged in investigative or prosecuting functions are not also involved in advising the decisionmaker. *Id.* at 57–58. Asimow, 81 Colum.L.Rev. at 765. As the agency has explained previously, the Office of Chief Counsel is so organized. 54 FR 1335; January 13, 1989 and 54 FR 46196; November 1, 1989.

As part of its comment on this issue, ATA states:

> * * * [I]ndividual cases should be left to the decisionmaker and truly independent advisors. If legal advice is needed, the agency should assign an attorney, who otherwise would not be involved in any aspect of investigation or prosecution to be the decisionmaker's attorney advisor.

ATA, in a footnote, states that the position of "attorney advisor" would resemble that of the attorney in the Office of the General Counsel who advises the Deputy Assistant Secretary for Policy and International Affairs in the Department's carrier selection proceedings for international route authority.

Although referenced by ATA, the Department's separation of functions in such proceedings does not provide support for ATA's recommendation. In international route cases, members of the General Counsel's Office participate in three capacities. During the hearing stage of such a proceeding, a member of the staff of the Assistant General Counsel for Aviation Enforcement and Proceedings, acting as "public counsel," presents a position to the administrative law judge. Following the administrative law judge's recommended decision, the Assistant General Counsel for International Law assigns a staff member to assist the senior career official (usually the Deputy Assistant Secretary for Policy and International Affairs) in reviewing the recommended

decision. The action taken by the senior career official is subject to additional review by the Assistant Secretary for Policy and International Affairs (or, in some cases, the Secretary). The Assistant General Counsel for International Law assigns a different staff attorney to advise this decisionmaker. This separation of functions is similar to the separation at the FAA for civil penalty cases.

At all stages of the process, the Department carefully maintains a proper separation of functions. Attorneys acting in their respective roles in the process do not communicate with one another, orally or in writing, with respect to the case. Nor is the separation of functions compromised by common supervision of the attorneys' work. For example, the Assistant General Counsel for International Law does not review the work performed on a case by the staff attorney assigned to advise the senior career official.

The third objection to the Chief Counsel's responsibilities, expressed specifically by NBAA and AOPA, is that his general supervision of all attorneys in the Office of Chief Counsel, including agency attorneys who prosecute civil penalty actions, as well as the attorneys who advise the decisionmaker, may tend to intimidate those attorneys from the proper performance of their duties. AOPA cites *Columbia Research Corp.* v. *Schaffer*, 256 F.2d 677 (2d Cir. 1958), in support of that proposition.

First, concerning the Chief Counsel's supervision of prosecutors, the Chief Counsel does not directly supervise agency attorneys engaged in the prosecution of cases in the program, nor their supervisors. The Deputy Chief Counsel is their ultimate supervisor; even this official, however, is not their first, and often not their second level supervisor. To the extent the Chief Counsel may take into account the handling of a prosecution under the program in evaluating the performance of an attorney, this consideration in no way interferes with the judging function, the independence of an administrative law judge, or the burden of proof placed on the prosecution by the rules of practice. It is difficult to envision any adverse effect on the fair adjudication of a case resulting from such supervision.

The separation of functions reviewed by the court of appeals in *Columbia Research* is different than the FAA's separation. In that case, the court disapproved of a separation whereby an Assistant General Counsel prosecutes and the General Counsel decides. Under the FAA rules of practice, the decisionmaker ordinarily is the Administrator, an official whose supervision of agency staff attorneys in an agency of 50,000 employees is diffuse to such a degree that the danger of intimidation, if any, is remote. In *Columbia Research*, the final decisionmaker was the General Counsel. In any event, the court's discussion of the adequacy of the separation of functions is better described as dictum, not an "alternate holding," as AOPA believes, 256 F.2d at 680 ("[W]e * * * reserve any final decision as to that * * *."). Indeed, the court's decision was later withdrawn on rehearing because of a superseding Supreme Court decision on a different issue, and thus does not constitute binding precedent. 256 F.2d at 680–681.

Moreover, the reasoning in *Columbia Research* has been described as "unsound." Asimow, 81 Colum.L.Rev. at 774. "[I]t is difficult to see how the purely formal commingling involved in *Columbia Research* is objectionable." *Id.* at 775. Professor Asimow's view that a stricter separation is appropriate in penalty proceedings, at 792, is not required by law, as AOPA appears to recognize in its criticism of the NPRM as "merely duplicat[ing] the requirements of the [Administrative Procedure Act]." Professor Asimow notes, "In the event that strict separation * * * is considered too confining, the existing [Administrative Procedure Act] provisions clearly permit a less rigorous system." 81 Colum.L.Rev. at 775 n.161.

Second, concerning the Chief Counsel's supervision of advisors to the decisionmaker, NBAA fears that the Chief Counsel's "pervasive, yet hidden, power [to approve promotions, performance reviews, assignments, etc.] consciously, or even more powerfully unconsciously, may influence any FAA attorney in her or his advice to the Administrator on an appeal." It is difficult to understand the basis for this concern. Assuming the Chief Counsel advises the decisionmaker, there is nothing wrong with his supervision of other attorneys who also perform that function. "Judging should be separated from functions that are incompatible with judging; that is what is meant by separation of functions." K. Davis, 3 *Administrative Law Treatise* 340 (2d ed. 1980). Because the Chief Counsel and the staff attorney would both be functioning as advisors to the decisionmaker, and both would play no role in the investigation or prosecution of the case or of a factually-related case, there is no combination of functions; there is only one function.

d. *The view that the Assistant Chief Counsel for Litigation's role is inconsistent with principles of fairness and the Administrative Procedure Act.* The objections here are that the Assistant Chief Counsel for Litigation (1) is "dependent on the degree to which the Chief Counsel and the Administrator view his performance" (NBAA), (2) has an "institutional" or "built-in" bias (NBAA, FAA in oral comments at the public meeting, and a private attorney), (3) is responsible for "keeping abreast of enforcement decisions," and "must maintain an active interest in * * * enforcement proceedings and decisions concerning th[e FAR,]" (a private attorney) and finally, (4) solely by reason of his status as an FAA lawyer, should not act as an adjudicator at all (a private attorney).

The first objection has been discussed earlier; because all officials in the chain of command are involved in adjudication, there is no combination of functions, much less an improper one. But NBAA's statement that,

> It would take a very brave [Assistant Chief Counsel for Litigation] to tell the Administrator or the Chief Counsel that a Demonstration Program case should be dismissed because the interpretation of the [Federal Aviation Regulations], upon which the Complaint was based (and the initial [Administrator's] enforcement priority), was faulty[.]

unjustifiably questions the professionalism of the Office of the Chief Counsel and the Office of the Assistant Chief Counsel for Litigation. Frank, candid, and independent advice to agency heads is required of all senior legal officials in the government. The regular exercise of such advice is not generally considered a badge of courage.

The agency has previously responded at length to the second objection, in the preamble to the interim final rule implementing EAJA (54 FR 46196–46198; November 1, 1989), and that discussion will not be repeated here. It is unclear whether the commenters' third objection is independent of their second objection. If it is, it runs counter to the public policy, discussed earlier, that favors the agency head's consultation with informed staff members, including lawyers, who have not otherwise been involved in the investigation or prosecution of the case.

The fourth objection concerns the ability of lawyers to act as adjudicators. Lawyers generally are considered well equipped to perform as adjudicators and, therefore, would appear to be qualified to advise or serve the decisionmaker. This objection may stem from a misunderstanding by some commenters as to the identity of the decisionmaker. The rules of practice have been explicit from the start that the

Administrator is the decisionmaker. The Administrator's reliance on lawyers for advice in making and issuing decisions is logical, given the nature of the issues presented for decision in civil penalty cases, and is common practice in the Federal government. That lawyers provide such assistance does not render them "decisionmakers" any more than it transforms judicial law clerks into Federal judges.

The limited delegation from the Administrator to the Chief Counsel and the Assistant Chief Counsel for Litigation does not change that reality. That delegation, by memorandum dated January 29, 1990, was made pursuant to 49 U.S.C. 322(b) and § 13.202, and is published concurrently with this notice, but in a separate part of the **Federal Register**. It is similar to delegations in other agencies and is designed to obviate the agency head's review and consideration of minor, procedural, or unopposed matters.

A few commenters (NACA, ALPA, AOPA, Eastern Airlines at the public meeting) recommend that in place of the Chief Counsel and attorneys in the Office of Chief Counsel, the Administrator should create a panel of advisors wholly independent of that office. While some agencies in the Federal government have created an office of advisors to the decisionmaker entirely separate from the legal office of the agency, such degree of separation is not required by the Administrative Procedure Act. It may well be counter-productive, in that the Administrator would be deprived of the counsel of his senior legal enforcement official. Interestingly, one commenter who recommends a panel of advisors would include the Assistant Chief Counsel for Litigation as a panelist.

NATA and American Airlines (at the public meeting) recommend that any panel of advisors include persons from outside government. NATA recommends, in addition to the Assistant Chief Counsel for Litigation, "one operations/regulatory expert, one independent counsel specializing in aviation law from outside the FAA, and one industry representative on a rotating basis." Apart from the notion that adjudicatory deliberations have been historically considered to be governmental functions, including an industry representative would inherently constitute a conflict of interest. The Administrator's decisions would be subject to challenge from any respondent who is a competitor of the "independent counsel's" or industry representative's employer.

3. Effect of admissions

Some commenters objected that a sentence in § 13.220(l)(3), regarding the use of admissions by the FAA, gave the agency an "advantage" without a corresponding benefit to a respondent. The relevant sentence stated:

> Any matter admitted or deemed admitted [pursuant to a written request for admission] under this section that results in a finding of violation may be used by the Administrator in a subsequent enforcement proceeding.

The FAA proposed to delete this section from the rules of practice. ATA agrees with the FAA that the easiest way to address the commenters' concern with this provision is simply to delete it from the rules. A majority of the commenters, including NACA, ALPA, AOPA, AOCI and AAAE, agree with the proposal. Despite the commenters' support for the proposed deletion, the reasons for that support vary. Some state that deleting this sentence will lead to the development of an evidentiary rule in the context of specific cases. Others believe that deleting this sentence will enable the administrative law judges, in their discretion, to permit use of admissions where they are relevant or necessary to avoid an unfair result. Insofar as the FAA is eliminating its use of respondent's prior admissions in future enforcement actions, the FAA believes that deleting the second sentence of § 13.220(l)(3) addresses the concern of most commenters because it eliminates a possible asymmetrical use of admissions in civil penalty actions.

While supporting the proposed deletion, ALPA suggests that the rule should further state that statements made in the course of informal procedures under § 13.16(f) may not be used as evidence in a civil penalty action. The FAA already has so limited itself in FAA Order 2150.3A, Compliance and Enforcement Program (hereinafter "Order 2150.3A). Paragraph 1207(a)(4) states:

> The informal conference should not be used as a means to gather additional evidence or admissions to prove the charges in the enforcement action. However, any additional information obtained may be used for impeachment purposes if the alleged violator changes his story with regard to a material fact in subsequent proceedings.

This paragraph of Order 2150.3A limits any subsequent use of information learned at an informal conference to "material" facts that may be used, if found relevant and material by an administrative law judge, solely for impeachment of testimony given under oath. Admissions by a respondent at an informal conference may not be used to sustain the agency's burden of proving at the hearing the allegations in its complaint. In light of this existing limitation on the agency, the FAA is not adopting this suggestion in this rulemaking.

Moreover, § 13.220(l)(3) deals only with formal admissions made during the course of discovery proceedings under the rules. It is possible, in theory, that a party could submit a request for admission of statements or matters developed during informal procedures. However, the administrative law judge has the discretion under the existing rules to determine whether such statements are relevant or material to issues in the action and, thus, whether such statements should or must be excluded under the rules of practice. As a matter of discovery practice in these civil administrative proceedings, the FAA does not believe that adding such a provision is necessary.

4. Opinion Testimony, Hearsay Testimony, and FAA Employee Testimony

Previous commenters objected, although for different reasons and from different perspectives, to both sentences in § 13.227. The commenters generally emphasized two objections: (1) The scope of factual testimony by FAA employees and (2) expert or opinion testimony of FAA employees.

a. Factual Testimony of FAA Employees

As to the scope of an FAA employee's factual testimony, the commenters objected to a sentence in § 13.227 that stated:

> An employee of the agency may testify in a proceeding governed by this subpart only as to facts, within the employee's personal knowledge, giving rise to the incident or violation.

The commenters argued that this sentence implicitly limited admission of relevant factual testimony by an FAA employee. In the NPRM, the FAA acknowledged that the sentence, when read standing alone, facially suggested inadmissibility of hearsay testimony by an FAA employee, otherwise admissible under the rules. The FAA also noted, however, that this sentence was never intended to, and would not in context, result in wholesale exclusion of any factual testimony of an FAA employee.

To address the commenters' previous concerns regarding this section, the FAA proposed in the NPRM to delete the entire sentence. Thus, FAA employees could testify as to any fact relevant and material to a disputed issue, and hearsay testimony by agency employees would be admissible. Adj.Com.Rec. at 5 (March 8, 1990). There was broad

support for the agency's proposal. ATA, NACA, AOCI and AAAE, and ALPA agree with the FAA's proposal, in essence stating that respondents should be able to elicit relevant factual testimony (including hearsay) from all sources (including FAA employees). Therefore, in light of the general support for the agency's proposal, the FAA is deleting the second sentence of § 13.227 as proposed.

Related to this issue, two private attorneys and Rocky Mountain Helicopters object to the admissibility and use of hearsay testimony, either as a general matter or particularly when given by an FAA employee, because such testimony is "not admissible" in Federal courts. Although hearsay is deemed inadmissible in Federal court under Rule 802 of the Federal Rules of Evidence, Rule 803 contains 24 distinct exceptions to Rule 802 under which hearsay testimony is admitted routinely in Federal court proceedings. And, while the Federal courts have chosen to tailor the admissibility and use of such evidence in their proceedings, the Federal courts also have stated that hearsay generally is admissible and widely accepted in civil administrative proceedings. *Veg-Mix, Inc.* v. *U.S. Dept. of Agriculture*, 832 F.2d 601, 606 (D.C. Cir. 1987)("* * * [I]f hearsay evidence meets the standards of the Administrative Procedure Act by being relevant, material, and unrepetitious * * *agencies are entitled to weigh it according to its 'truthfulness, reasonableness, and credibility' " (citations omitted)); *Evosevich* v. *Consolidation Coal Co.*, 789 F.2d 1021 (3d Cir. 1986), citing *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971); *Johnson* v. *United States*, 628 F.2d 187, 190 (D.C. Cir. 1980).

The NTSB has recognized the admissibility and use of hearsay evidence in its proceedings. *Administrator* v. *Irish, NTSB Order EA-3080 at 7 (March 14, 1990); Administrator* v. *Budar*, 3 NTSB 1913, 1914 (1979); *Administrator* v. *Ortner*, 2 NTSB 396, 397 n.5 (1973); *Administrator* v. *Trier*, 2 NTSB 379, 380 (1973) ("It is axiomatic that hearsay evidence is admissible in administrative proceedings, in contradistinction to practice in law courts. The issue with respect to hearsay concerns the weight to be attached to it in each case, rather than to its admissibility").

In light of the broad admissibility of this evidence in administrative proceedings and the discretion vested in the administrative law judge to determine the weight accorded hearsay evidence, the FAA is not revising the rules of practice to restrict the admissibility and use of relevant and material evidence, including hearsay. Notably, the majority of the commenters agree with the FAA that hearsay testimony should be admitted, particularly as it applies to the admissibility of relevant and material factual testimony given by FAA employees in civil penalty actions. Although hearsay is admissible under the rules of practice, hearsay evidence (admissible under § 13.222(c)) must meet the admissibility criteria in § 13.222(b) applicable to all evidence in these proceedings.

Because NBAA seems to object to any asymmetry in the evidentiary rules of practice, the FAA presumes that the revisions address NBAA's concern regarding this section. Deleting this sentence results in a single rule applicable to both parties that governs the admissibility and use of relevant and material factual testimony, whether offered by the FAA or a respondent.

b. Expert or Opinion Testimony of FAA Employees

With regard to expert or opinion testimony by FAA employees, some previous commenters also objected to the first sentence of § 13.227, which stated, in pertinent part:

> An employee of the agency may not testify as an expert or opinion witness, for any party other than the agency, in any proceeding governed by this subpart.

As noted in the NPRM, this limitation on agency employee expert or opinion testimony merely reflects an identical limitation in Departmental rules issued by the Office of the Secretary (OST) of the Department of Transportation, governing all employees of the Department. 49 CFR 9.5(a). The FAA reviewed both the recommendation of the Committee on Adjudication and Professor Fallon's report and in the NPRM discussed the policy basis for the agency's limitation. The agency also explained its concern about deleting this sentence, noting its belief that keeping this provision in the rules better serves the public interest, avoiding the real potential for confusion regarding "official" and "unofficial" testimony by persons employed by the agency. Accordingly, the NPRM proposed to retain the limitation. A number of commenters object.

NBAA, in support of its position, cites the possible need of a private party to introduce into evidence a prior statement by an FAA employee of an opinion on the requirements of the Federal Aviation Regulations, on which statement the private party had relied. While agreeing generally with the proposed change, AOPA's support is conditioned on a two-fold caveat that prompts AOPA to recommend that the provision be deleted. Like NBAA, AOPA is concerned that (1) the rule could prevent a respondent from eliciting what could be considered expert or opinion testimony from an employee called by the agency and (2) there may be circumstances (reviewed and resolved on a case-by-case basis by an adjudicator) to warrant a respondent calling an FAA employee as an expert or allowing opinion or expert testimony of an FAA fact witness. At the public meeting, a private attorney speaking on behalf of EAA and the NTSB Bar Association and ATA echoed this need to call or cross-examine FAA expert or opinion witnesses.

ALPA states that the agency's concerns about FAA employees are "unpersuasive" and also urges the FAA to delete § 13.227. ALPA believes that only rarely would a respondent call an FAA employee and, on those rare occasions, it would be obvious that the employee is testifying "as an individual" and, thus, no confusion would arise. Moreover, ALPA contends that if the FAA "is truly concerned about any 'confusion' on this issue," the agency can include a statement that it is not bound by the unofficial testimony of an FAA employee called by a respondent.

The FAA disagrees with the statement by several commenters that there is no reason for this limitation. Several commenters acknowledge some validity in the FAA's position. AOPA agrees that the FAA should be able to restrict the use of its employees as experts for others. In AOPA's words, "This is a familiar restriction found in other Federal agencies to prevent the diversion of agency personnel from their assigned duties." NBAA recognizes that the "entire FAA ought not to be subjected to subpoenas to testify" in these cases but argues that witnesses with regulatory oversight of the respondent or relevant sections of the regulations should be compelled to testify.

ATA suggests that the simple solution is for the FAA to delete this section, positing that if the FAA's fear for its employees is justified, it is equally justified for respondents. ATA, NBAA, and NACA further urge the FAA to prompt OST to change the Departmental rule on expert and opinion testimony of employees. ATA and NACA suggest the FAA petition the Department for an exemption to the existing employee testimony regulation. ATA states that "DOT already has provided such an

exemption for enforcement proceedings brought by other government agencies." ATA cites 49 CFR 9.5(a), which pertains to certain U.S. Coast Guard proceedings brought against military personnel and requires that such military personnel have the same opportunity as the government to obtain witnesses. As ATA notes, this exemption is required by the Uniform Code of Military Justice (10 U.S.C. 846). The Department, therefore, was statutorily required to provide the narrow exemption that now exists. However, the exemption does not apply to civil penalty actions taken by the U.S. Coast Guard against private individuals or entities for regulatory violations. It applies only to actions taken by the Coast Guard against Coast Guard personnel (and therefore technically DOT employees) in court martial proceedings and before discharge boards. This limited exemption required by law does not provide a basis for a change in the Departmental rules or the rules of practice as recommended by ATA and NACA.

ALPA contends that § 9.5 of the Department's rules is not a barrier to FAA employee opinion or expert testimony on behalf of a respondent in civil penalty actions. ALPA reads that section to create a distinction between testimony that is "*compelled* by subpoena and not offered voluntarily by the witness," believing § 9.5(a) to deal only with "*voluntary* testimony by agency employees." ALPA reaches this conclusion by comparing § 9.5 with § 9.13 of the Department's rules. The FAA does not so read the regulations in 49 CFR part 9. Section 9.13 applies only to legal proceedings *between private litigants;* § 9.5 applies only to proceedings in which the United States is involved, such as civil penalty actions. The interests of the government in both types of proceedings are strikingly similar, as expressed in § 9.7 (the general rule regarding DOT employee testimony in private litigation). Moreover, § 9.5 is the only section that deals with employee testimony in proceedings in which the government is involved and that section does not differentiate between testimony compelled by subpoena or given voluntarily, unlike other sections of part 9. See § 9.9 and § 9.11. Thus, § 9.5, on its face, applies whether the employee's testimony is compelled or is given voluntarily in proceedings in which the United States or the Department are involved, either directly or indirectly.

The FAA continues to believe that the rule in question should not be deleted. It accurately reflects a Departmental regulation that is outside the scope of this rulemaking and embodies a limitation recognized as wholly proper. The NTSB's decision in *Administrator* v. *Sims and McGhee*, 3 NTSB 672 (1977) is a case in point, cited by a private aviation attorney who commented on the NPRM. In that case, the NTSB upheld the exclusion of an FAA employee from testifying as an expert or opinion witness on behalf of pilots in an enforcement proceeding. The NTSB stated:

> The Board has no reason to question the validity of regulations such as 49 CFR 9, which are within the authority of the issuing agency (DOT, in this instance) and the effect of which have generally been honored by the courts.

3 NTSB at 674–675 and n.13 (citing *Farrell* v. *Piedmont Aviation, Inc.*, 50 F.R.D. 385 (W.D.N.C. 1969), and *Craig* v. *Eastern Air Lines*, 40 F.R.D. 508 (E.D.N.Y., 1966), "wherein the courts refused to allow discovery of the opinion and conclusions of FAA employees"). The Board continued:

> The apparent and, in our view, legitimate purpose of the regulation is to avert the conflict of interest inherent in a situation where a government employee is, in effect, serving two masters.

3 NTSB at 675 n.12. Beyond the general objection noted above, the commenters previously posed, and some continue to pose, specific objections to keeping this section in the rules of practice. The commenters argue that this sentence apparently limits cross-examination of an FAA employee's expert or opinion testimony. The commenters also argue that it creates an apparent disparity between the government and private parties because the rule does not similarly address the expert testimony of employees of private parties.

(1) *Cross-examination of an FAA expert or opinion witness.* Most commenters express general support for the FAA's effort to revise § 13.227 but some still express concerns regarding a party's ability to cross-examine an FAA expert or opinion witness. ATA believes that the rule still may prevent or restrict full and complete cross-examination of, or discovery directed to, an agency employee. To cure this perceived defect, ATA suggests that the rule include a sentence regarding the scope of cross-examination as it relates to direct or factual testimony. Two private attorneys also claim that the rule "prohibits" cross-examination of an FAA expert. Certainly, that sentence did not and does not reach that far.

On the other hand, ALPA does not read the rule as "imposing *any* limit on cross-examination of a witness called by the FAA; rather, the rule is concerned only with the scope of the testimony that can be offered by an FAA employee called by the respondent." ALPA urges that any changes to the rule should make it clear that there is no limit on the normal scope of cross-examination, including the posing of opinion questions to an FAA witness in some circumstances.

After close review of the continued objections by commenters regarding effective cross-examination and the arguments presented in defense of their positions, the FAA is keeping this sentence but narrowing its scope even further. The FAA is revising that sentence by inserting the italicized language so the section reads as follows:

> An employee of the agency may not *be called* as an expert or opinion witness for any party other than the agency in any proceeding governed by this subpart.

This change is intended to address concerns expressed by ATA and AOPA that this sentence, if unchanged, would continue to chill a respondent's cross-examination of an FAA employee who has been called by the agency as an expert or opinion witness. The FAA declines to adopt ATA's suggestion to insert additional language in the rule regarding the scope of cross-examination. The FAA believes that the administrative law judges have the discretion to determine what is necessary and permissible for full and complete cross-examination during discovery and any hearing. As amended, the FAA believes that § 13.227 clarifies that a respondent is able to engage in permissible cross-examination of the agency's expert or opinion witnesses. The FAA also believes that the revision addresses the recommendation of the Committee on Adjudication. Adj.Com.Rec. at 5 (March 8, 1990).

(2) *Disparity between government and private party expert or opinion witnesses.* The most common objection to the remaining sentence in § 13.227 is that the rule unfairly omits addressing employees of private parties, leaving the inference that no similar limitation applies to their testimony and the FAA, therefore, is free to call them as its expert witnesses. This objection is expressed by ATA, NBAA, NACA, Rocky Mountain Helicopters, NATA, and one private attorney. NATA recommends that the rule either should restrict both parties' use of experts or opinion witnesses or should reflect that any party may use the testimony of any party's expert. Although, as noted in the NPRM, it is not the FAA's practice to

use expert or opinion testimony of employees of an opposing party, these commenters urge either that the limitation in the rule be eliminated or that the rule be modified to apply equally to both parties to a proceeding.

The FAA is satisfied that the rule, as amended, and its purpose are sufficiently clear to preclude a construction that would either (1) exclude a private party's otherwise admissible evidence of an opinion previously given by an FAA employee outside of the adjudicatory proceeding or (2) prevent or limit otherwise proper cross-examination of opinions given by an FAA employee on direct examination as a witness for the agency. The first example does not involve an employee's testimony for a non-FAA party. As to the second, we know of no instance in which an administrative law judge has relied on either the FAA's rule or its Departmental counterpart to limit the scope of otherwise proper cross-examination of an employee's testimonial opinions. The FAA is confident that an administrative law judge will rule properly in such situations and will do so without reference to the limitation in § 13.227.

Notwithstanding the agency's belief that the limitation in the rule, as amended, is necessary and proper, it is equally clear that, to a significant segment of the aviation community, it appears to be one-sided in that it does not similarly limit FAA's use of an opposing party's employees as expert or opinion witnesses. While the FAA does not consider such a limitation to be necessary to achieve that result, it considers the evenhanded appearance of the rules to be important.

In addressing this concern, the FAA does not want to restrict the ability of a respondent to call experts or opinion witnesses to testify on the respondent's behalf or to somehow limit the testimony of an expert or opinion witness who appears for a respondent. Thus, the FAA instead is revising the title of § 13.227 and also inserting a limitation on the agency's ability to call experts employed by a party in a civil penalty action. The FAA is adding a sentence to § 13.227 that reads as follows:

> An employee of a respondent may not be called by an agency attorney as an expert or opinion witness for the agency in any proceeding governed by this subpart to which the respondent is party.

The FAA believes that adding this provision responds to the primary concern of commenters who continue to object to § 13.227 because it still appears asymmetrical. Revised § 13.227 now addresses only an FAA employee's obligation to appear as an expert or opinion witness and the agency's ability to choose experts or opinion witnesses. Because both sentences now speak only to "calling" an expert or opinion witness, and not in terms of "testifying," this section should not restrict an FAA employee's factual testimony or a party's ability to cross-examine an opposing expert or opinion witness.

In its comments to the NPRM, NACA states that the FAA should delete the entire section and "opinion testimony should be permitted" so as not to violate a "fundamental right of fairness." NACA did not further explain how that sentence, as it existed or as proposed, "prohibits" opinion testimony in civil penalty actions. Section 13.227 does not ban the use of experts or opinion witnesses, either on its face or implicitly, and a majority of the commenters do not view that sentence as prohibiting opinion testimony. The FAA believes that the revisions to § 13.227 in this document make it abundantly clear that expert or opinion testimony, offered by either party, is permitted by the rules of practice.

Rocky Mountain Helicopters states that the "Federal Rules of Civil Procedure clearly contemplate the use of opposing expert witnesses * * *." and believes that the FAA's rule impedes a respondent's ability to present his or her case and to confront and cross-examine witnesses. The FAA, however, does not believe that the rule could be read to prohibit the use of opposing experts in these proceedings or cross-examination of an FAA expert. In light of the FAA's revision of § 13.227, the FAA has addressed these concerns.

5. Written Arguments

Some previous commenters stated that § 13.231 of the rules of practice prevented a respondent from submitting written briefs in support of motions made during a hearing or posthearing briefs. While the agency noted its preference for oral argument and decisions in relatively simple or straightforward cases, previous commenters indicated a strong preference for written submissions, arguing that the FAA's rule adversely affected their ability to present their case to an administrative law judge.

To address these concerns, the FAA proposed to leave the decision to submit written briefs in the hands of the parties or the administrative law judge, if the law judge determined that written submissions are "necessary or required for resolution of the issues or the case." Most commenters express some opinion about the proposal; however, their suggestions for additional changes vary and, in some cases, are inconsistent. Some commenters continue to believe that the agency is attempting to restrict the ability to file written briefs and urge further changes to the rule.

NATA has no specific comment on the proposal but believes that the rules before the proposal were too limiting. AOCI and AAAE advocate further expansion of the rule to give the administrative law judge the authority to "require" written arguments, or allow the parties to submit written arguments if they agree, where written arguments "would be of value" or "would be helpful" to resolve the issues or the case.

While noting that the proposal is a significant improvement, ALPA believes that the parties should have the "right" to file written briefs if they agree to do so and the administrative law judge should not have "veto power" over that decision. (ALPA suggests that the proposed rule be modified so that the parties could submit briefs even if the administrative law judge determines that they are not necessary or required. The rule, as proposed, would have given the parties that ability, in essence, to override the law judge's decision.) If the parties cannot agree, ALPA suggests that the decision be left to the administrative law judge, based on a determination that briefs are required or necessary.

AOPA urges that matters involving written arguments should be left to the administrative law judge's discretion, presumably unfettered, to be determined on a case-by-case basis, subject to review on appeal for abuse of discretion. NBAA urges the FAA to clarify that the administrative law judge has the discretion to request written briefs. While the concurrence of both parties is preferable in NBAA's opinion, NBAA believes that the administrative law judge should decide whether "additional" submissions would benefit development of the record and one party's objection should not bar submission of written arguments.

ATA continues to object to any presumption in the rules against written argument and any requirement that respondents "give up" oral argument in order to submit a written argument. ATA suggests that respondents (and presumably the agency although ATA did not so state) should be allowed to file written briefs whenever the administrative law judge finds that doing so would be "reasonable."

These continuing objections to this section are not a universally held sentiment, however. The Committee on

Adjudication of the Administrative Conference recommends that the rules "*permit* the filing of posthearing briefs whenever, in the [administrative law judge's] view, the interests of justice so require." Adj.Com.Rec. at 5 (March 8, 1990) (emphasis added). NACA concurs with the Committee's recommendation, noting that the administrative law judges should be vested with the authority to control their dockets regarding the filing of posthearing briefs.

Only the Tobacco Institute focuses directly on the agency's concern that respondents who choose to represent themselves or appear without counsel in these actions may benefit from the preference for oral argument and oral decisions in relatively simple or straightforward civil penalty cases. The Tobacco Institute states that respondents in civil penalty proceedings should not be "burdened by unnecessary formalities—notably written submissions—where their cases do not involve complex disputes or extensive research." The Tobacco Institute also states that all parties should have the opportunity to offer written arguments if the parties desire or the administrative law judge believes it will advance resolution of the case. The Tobacco Institute states that the FAA's proposed changes recognize those interests. Also, so long as the procedures are not amended to require written arguments, the Tobacco Institute endorses the FAA's proposal.

In the NPRM, the agency asked commenters to discuss the costs, impacts, and benefits of requiring parties to submit written arguments in civil penalty cases. Only NBAA comments on this issue. Without significant elaboration, NBAA asserts that the benefits of submitting written arguments "far outweigh the costs" and the cost to the respondent, over which he or she has "significant control," is reasonable. NBAA dismisses any cost to the FAA as "probably not a significant variable within the agency's overall budget * * *."

Contrary to the assertions of several commenters, section 557(c) of the Administrative Procedure Act does not confer on the parties a "right" to file written argument before an initial decision is issued by an adjudicator. That section speaks only to a "reasonable opportunity" to submit for the adjudicator's consideration proposed findings and conclusions, exceptions to decisions, and supporting reasons before an initial decision is issued. Because section 557(c) does not mandate written arguments during a hearing or at the close of hearing, the FAA will not require their submission in its rules.

Instead, the FAA is leaving the decision entirely in the hands of the administrative law judge. The FAA is amending § 13.231 to provide that the administrative law judge may request written briefs during a hearing or after a hearing when it is reasonable to do so. In addition, the FAA is deleting the phrase in the proposed rule that would allow the parties to submit written briefs pursuant to agreement of the parties despite an administrative law judge's determination that such written arguments are not required or necessary. The FAA also is amending § 13.231(c) to delete the phrase "instead of final oral argument," thus allowing a party to provide final oral argument and written posthearing briefs if the administrative law judge determines that both opportunities should be provided in a particular case.

NBAA believes that it is highly unlikely that an administrative law judge would ever "have to compel submission" of a written argument. This assertion may be true for sophisticated or represented parties who, in NBAA's opinion, would readily recognize that the administrative law judge's suggestion to submit a written brief indicates that the "person deciding their case wants some additional guidance." The agency is sensitive, however, to the potential effect of such a "suggestion" to respondents who are not familiar with an adjudicatory process or who are not represented by counsel in these proceedings. Precisely because NBAA opines that "as a matter of practical reality failure to respond to the trier's request [for written argument] is foolish," the issue should be highlighted here. To the extent that those parties who do not believe, or are not aware, that posthearing briefs would aid the administrative law judge in resolving their case, the FAA is confident that an administrative law judge also will recognize the issue and will not draw any adverse inference solely from a party's failure to submit a written argument.

6. Modification of Civil Penalty by an Administrative Law Judge

Previous commenters objected to a sentence in § 13.232(a) that required an administrative law judge to support in an initial decision a reduction of the civil penalty sought by the agency for an alleged violation. Despite the provision in the rules squarely placing the burden of proof on the agency, this sentence was criticized as improperly shifting the burden of justifying a civil penalty from the agency attorney to the administrative law judge. The agency noted that this requirement was not unique to the FAA, and that the sentence in § 13.232(a) was patterned after decisions by the NTSB. Indeed, the NTSB requires its administrative law judges to show a "clear and compelling" basis for reduction of a proposed sanction in certificate actions, a much higher standard than that contained in § 13.232(a). *Muzquiz* v. *NTSB*, 2 NTSB 1474 (1975).

According to NBAA, the *Muzquiz* doctrine provides a reasonable standard to govern an administrative law judge's exercise of the power to review the proposed penalty developed by the agency. In NBAA's words, "Nothing should be added in Part 13." Several commenters criticize the *Muzquiz* decision, and implicitly the agency's reliance on that decision, arguing that the NTSB should overrule its 1975 decision. whether the NTSB ultimately overrules *Muzquiz* is not relevant here in light of the agency's proposed revision to § 13.232(a).

The agency proposed several amendments to the rules of practice to address the commenters' concerns. ATA supports the proposals in the NPRM, stating that the proposals are "useful improvements" to the rules of practice. AOCI and AAAE also support the proposals as drafted, noting the additional support for these proposals in Professor Fallon's report.

To the extent that the commenters claim that additional burdens had been placed on the administrative law judge by the previous rule, the FAA addressed those concerns in the proposed amendments. First, the FAA proposed to delete the sentence in § 13.232(a) regarding explanation of any reduction in the amount of civil penalty. ALPA supports the proposal to delete this sentence from § 13.232(a). AOPA also concurs in the proposed deletion of this sentence, stating that the matter then will rest "where it best should be," with the administrative law judge and the Administrator on appeal.

Although it was raised as a comment on the issue of modification of a proposed civil penalty, the Tobacco Institute suggests that the FAA provide criteria or "standards placed on the public record" to guide the agency's and the administrative law judges' decisions on penalty levels. As noted by the Tobacco Institute, the FAA addressed that suggestion in its disposition of comments submitted on the final rule and will not repeat that discussion here. 54 FR at 11918–11919; March 22, 1989. The FAA believes that the revised rule addresses the Tobacco Institute's desire

to preserve the discretion of the administrative law judge "to levy a sanction appropriate to facts that emerge at a hearing." Not all commenters agree with the Tobacco Institute, however. For example, NBAA states that "The persons charged with the day-to-day administration of these cases have to be allowed * * * to exercise their best judgment as to what sanction is appropriate."

Second, the FAA proposed, conforming with the recommendations by Professor Fallon and the Committee on Adjudication, to modify the second sentence in § 13.232(a) to require an administrative law judge to include in an initial decision a discussion of the "amount of any civil penalty found appropriate by the administrative law judge."

Although other commenters seem to disagree, ALPA claims that "no one" is suggesting that an administrative law judge should not explain a reduction of a proposed civil penalty. ALPA advocates an additional requirement to explain a "refusal" to reduce a proposed penalty where such reduction is sought by the respondent. In ALPA's words, the administrative law judge should explain "any decision" regarding a proposed penalty if that is an issue in the case. The Tobacco Institute states that the "better approach" is evidenced by the proposed amendment to apply the same requirement to decisions that modify or affirm the agency's proposed penalty. The agency's proposed amendment to § 13.232(a) contemplates precisely what ALPA and the Tobacco Institute suggest ought to be done in each case. To the extent that ALPA objects to the use of the terms "affirm, modify, or reverse" as they refer to an initial decision on proposed civil penalties by an administrative law judge, the FAA agrees with ALPA's concern and is modifying that sentence, as well as other sections of the rules that contained those terms, as discussed previously.

AOPA objects to adding the proposed language to § 13.232(a), believing it to be an attempt to insert the same restriction in different language in a different place in the rule. Nevertheless, AOPA admits that the interpretation of this sentence, presumably by the administrative law judge and the Administrator on appeal in the context of a particular case, will determine whether this is an attempt to restrict the administrative law judge in favor of the agency. The FAA is confident that an administrative or judicial adjudicator would not read beyond the plain language of the rule to limit or expand that language, particularly in light of the history and discussion surrounding this provision.

The proposed changes merely mirror what already is required of an administrative law judge pursuant to the Administrative Procedure Act. Pursuant to section 557(c), an administrative law judge must include a statement of "findings and conclusions, *and the reasons or basis therefor*, on all material issues of fact, law, or discretion presented on the record * * *." (Emphasis added.) As AOPA has so aptly noted, the agency's first proposed change will preserve the administrative law judge's discretion regarding sanction, as it currently is set forth in the Administrative Procedure Act. Thus, a discussion of any sanction found appropriate by the administrative law judge in a particular case should be discussed in the decision so as to comply with the Administrative Procedure Act. Moreover, the agency stated in the NPRM, and repeats here, that a detailed or elaborate articulation may not be necessary to satisfy the requirement in section 557(c). The adjudicators in these actions, on a case-by-case basis, can determine how best to fulfill their obligations under section 557(c) of the Administrative Procedure Act by providing whatever level of discussion they deem appropriate.

In light of the significant support in the comments for the agency's proposal, the agency is adopting several of the proposed changes to § 13.232(a). The agency is deleting the fourth sentence in § 13.232(a), eliminating any specific requirement for an administrative law judge to explain a reduction in a civil penalty proposed in the agency's complaint. Adj.Com.Rec. at 5 (March 8, 1990). Also, after analysis of the comments and review of the recommendation by the Committee on Adjudication and Professor Fallon, the FAA is inserting the phrase "the amount of any civil penalty found appropriate by the administrative law judge" in the second sentence of § 13.232(a).

7. Compromise of penalties

The FAA solicited comment on the agency's policy against civil penalty compromises that result in no formal finding of violation. In the NPRM, the FAA asked a series of detailed questions to aid its understanding of the commenters' positions on the existing compromise policy and assist in the formulation of possible changes to that policy. The agency announced publicly, both in the NPRM and at the public meeting, "somewhat of a retreat" in the way it had construed the statute, which had contributed to its policy of insisting on a finding of violation in all cases in which payment was received. The agency noted that the FAA could proceed to a final rule and need not await a "legislative correction" to the statute if the FAA concluded, as a matter of policy, that compromises without findings are an appropriate resolution of some cases. The Adjudication Committee of the Administrative Conference had recommended just such a review and reconsideration of the statute and legislative history pending legislative clarification. Adj.Com.Rec. at 4 (March 8, 1990).

Nearly every commenter expresses an opinion on the issue of compromising civil penalty actions without a finding of violation. Some commenters criticize the agency even for having solicited comment on the issue. Despite these commenters' protestations, the comments have been useful to the agency's review and development of an appropriate compromise policy.

a. Policy Change Versus Rule Amendment.

AOCI and AAAE believe that the rules of practice "must reflect the ability to compromise the proposed penalty without the admission of a violation * * *." Nevertheless, AOCI and AAAE state that the regulations should not circumscribe the types of cases that could be compromised to promote administrative efficiency and the interests of justice. Instead, the agency should determine, on a case-by-case basis, whether and when it is appropriate to compromise a civil penalty case. AOCI and AAAE suggest that § 13.16 be amended to show that a compromise agreement is permitted if it "is *not contrary to* the public interest." In the NPRM, the FAA had proposed language that compromise would be permitted if "such an agreement is in the public interest." AOCI and AAAE believe that their language would give the FAA greater flexibility yet ensure that the public interest is not adversely affected.

NATA states that the rules of practice should be amended to permit the FAA to consider a history of prior violations "only" when a future complaint is the result of a "repeated alleged violation of the same rule." (It is not clear whether NATA considers a "history of prior violations" to include only violations resulting from adjudication or alleged violations that may be reflected in a compromise agreement.) APA advocates a return to "the settlement practice prior to the adoption" of the program and believes that the rules should be amended to reflect that payment of a

civil penalty "prior to an administrative hearing" is not an admission of the allegations or a formal finding of violation.

AOPA views the issue as a matter of policy but does suggest that criteria could be established and articulated in Order 2150.3A. AOPA urges the FAA to amend its policy so that it is within the discretion of the agency in a particular case to settle a civil penalty "with or without a finding of violation." As to criteria to distinguish cases that would be appropriate for compromise, AOPA suggests that a "finding should be required in the more egregious cases and for repeat offenders and where the agency, in its prosecutorial discretion, finds individual circumstances where the public interest requires a finding." AOPA does not further define "egregious cases" or cases where the "public interest requires" a finding, but suggests that distinctions articulated in Order 2150.3A between administrative action and legal enforcement action would be helpful. (The FAA notes, however, that the distinctions in Order 2150.3A currently guide the discretion vested in FAA inspectors to distinguish cases that are not appropriate for legal enforcement action, not cases where that determination has been made.)

On the other hand, some commenters consider this issue solely a matter of policy. RAA urges the FAA to adopt a policy of compromises without issuing an order that contains a finding of violation. RAA states that the FAA could refuse to compromise if, in the belief of the FAA attorney, an alleged violator views the payment of civil penalties as a "cost of doing business." RAA believes a compromise policy would benefit the FAA by eliminating cases that are "legally unfounded, poorly substantiated, or politically motivated * * * without gross embarrassment to the agency." (Where those factors are relevant, however, they are considered more appropriate to a decision declining to prosecute the action in the first instance.) NBAA regards the issue of compromise as a matter of development and use of "local judgment" and "careful, thoughtful actions" by those persons familiar with the specific case. NBAA believes that a finding of violation "has not historically been found to be a legally mandated predicate to the compromise of civil penalty cases * * *" and urges the FAA to eliminate any distinction in compromise policy between civil penalty cases that exceed $50,000 and those that fall below that amount.

NACA believes that a "flexible approach to settlement" should be followed by the FAA. NACA suggests that the agency refuse to compromise in cases that show a "lack of compliance disposition on the part of the violator or the matter is so egregious that the violator should certainly have known in advance he was violating" the regulations. ATA vigorously supports a flexible compromise policy and believes the FAA should retain the discretion to "decline settlements with, or insist on substantial settlement amounts from, recidivist respondents."

ALPA believes it is neither "necessary or desirable" to articulate or codify a comprehensive set of criteria to select cases in which compromise would be acceptable or appropriate. Instead, the agency should exercise its discretion but could compromise where a violation is minor or unintentional, where problems of proof exist in the case, or where the respondent has an "excellent" record of compliance. While Rocky Mountain Helicopters supports the agency's willingness to compromise civil penalty cases, it states that the rules of practice should govern only procedural aspects of the enforcement process and should not limit either the prosecutor or the adjudicator. This opinion leads Rocky Mountain Helicopters to conclude that if the "prosecutor insists upon a finding of violation, clearly that fits within the prosecutor's discretion."

b. Use of Compromised Civil Penalties

An issue of primary concern to most commenters is any future use of a compromise agreement by the agency or the admissibility of a compromise agreement in future litigation. Most commenters recognize the propriety of the agency's consideration of a prior compromise agreement, although the commenters do not necessarily agree on the extent of the agency's consideration of such agreements.

AOCI and AAAE "recognize the FAA's enforcement interest in using a respondent's regulatory history" to determine appropriate action in future cases. Thus, AOCI and AAAE believe that the FAA should have the ability to consider past compromises in deciding whether to initiate or to compromise future enforcement actions. ALPA believes it is appropriate for the agency to refuse to compromise an action without insisting on a finding of violation where there has been a previous compromise with the same respondent for a similar violation. Nevertheless, ALPA states that compromise agreements should not be "available for use in subsequent cases before the FAA, DOT, NTSB, or elsewhere."

NBAA suggests that the FAA turn to "history" for guidance regarding the use of civil penalty compromises. NBAA notes that "There are no easy answers other than the judicious administration of the program * * *" and discourages establishment of rules that would inhibit careful analysis of a particular case. NBAA comments that an "enforcement folder full of compromise agreements usually results" in a significantly higher penalty on the next case; however, an administrative law judge would scrutinize the facts "in a previous single compromised case" before using a document that does not "admit guilt as a basis for a severe subsequent penalty." It seems from these comments that NBAA would not object to the agency's use of previous, similar compromised civil penalty actions to analyze a case and determine an appropriate sanction or the propriety of compromise for a similar violation.

While not requesting expunction of records related to compromises, RAA suggests that records of compromises should not reflect an admission of guilt. Thus, the FAA would have the option of considering an alleged violator's compliance history in subsequent proceedings. In AOPA's view, only "findings" should be made a matter of record to be considered in the case of future alleged violations. AOPA also advocates expunction of certain enforcement and incident information from an airman's record after an appropriate time. In this light, AOPA disagrees with the current practice of including compromised civil penalties as a matter of record and considering them to decide appropriate action for future violations. On the issue of accountability, AOPA states that if an alleged violation is so serious, it should be a matter of record for consideration in a future enforcement action. However, cases that are not "so serious," could be compromised and should not be included as a matter of record or used to determine future enforcement action. AOPA suggests that criteria should be established and reflected in Order 2150.3A to define these cases.

NATA is concerned about the use of a compromise agreement in a future, unrelated case and suggests that a finding of a prior, unrelated violation is irrelevant unless it is used to show "overall lack of qualification" that justifies certificate action under section 609 of the Federal Aviation Act. One private attorney suggests that the agency "should not be allowed to consider * * * any previous violation history in subsequent civil penalty

actions." This commenter also states that payment of a fine should not be construed as an "admission of guilt" in subsequent civil penalty actions.

With regard to the agency's concern about the "deterrent effect" of a compromise and the public interest in accountability, APA simplifies the choice by suggesting that the FAA initiate certificate action against a violator instead of a civil penalty action for violations of safety regulations. APA claims that the agency's concerns on these issues lack substance in light of the dichotomy that exists for civil penalty actions over $50,000 and those that are at or below that amount. Although this disparity exists, it is the result of a jurisdictional limit in the enabling legislation.

c. Compromise System

As to the mechanics of compromising a civil penalty action, RAA and ALPA suggest that compromise should be available at any stage in the proceedings. Also, ALPA advocates issuance of a document entitled "settlement agreement" that contains an "agreed summary" of the alleged violations, a statement that the agency will accept a specified civil penalty as full settlement, and a statement that the respondent agrees to pay the civil penalty without admitting the alleged violations.

ATA offers a suggested system for compromise: (1) Criteria contained in Order 2150.3A to assist in determination of an appropriate sanction should be used to guide the agency's discretion; (2) regional attorneys should be trained to apply the criteria consistently and be vested with the authority to compromise; (3) FAA headquarters personnel should monitor the amounts and types of compromise to ensure reasonable consistency; (4) respondents should be able to "address concerns" about the compromise of individual cases to FAA headquarters to promote consistency; (5) a record of past compromises could be used by the FAA to guide all aspects of prosecutorial discretion but should not be admissible in enforcement "trials" for any purpose. ATA disagrees with DOT's practice of construing settlements as "findings" and urges the FAA not to adopt a similar practice.

Upon consideration of all the comments made on this issue, the FAA has determined to change its general policy on compromises to permit settlements without admissions or formal findings of guilt and to amend the rules to reflect this change.

It may be helpful to a discussion of the compromise issue to first distinguish between an "admission" of violation and a "finding" of violation. Neither the existing rules nor agency policy requires persons agreeing to pay a civil penalty to "admit" the violations alleged in a notice of proposed, or order assessing, civil penalty. However, a failure to contest a proposed civil penalty results in the issuance of an order assessing civil penalty. Under the Administrative Procedure Act, an "order" is a final agency disposition formulated by the process of adjudication. 5 U.S.C. 551. Therefore, an order ordinarily represents an agency's "findings" in a matter.

As discussed in the NPRM, the main public interests in making such findings in enforcement cases is to establish accountability and a violation history admissible in evidence in the event of future enforcement actions against the same person. It can be inferred from the public comments, on the other hand, that there is a substantial willingness to pay civil penalties without contest if no finding of violation is made. Settlement of cases without costly adjudication can, if otherwise appropriate, also serve the public interest. The FAA concludes that these competing public interests in adjudication and in settlement, by their nature, can best be evaluated on a case-by-case basis in the sound exercise of prosecutorial discretion, a proposition urged by several commenters.

This change in agency policy to permit the exercise of such discretion does not require a change to the rules of procedure in civil penalty cases. However, § 13.16(p) and definition of "order assessing civil penalty" are being amended in order to assure full awareness of the change, to allow for documentation of "no finding" compromises in orders assessing civil penalty, and to assure that orders in such cases may not be used by the agency as evidence of a prior violation in civil penalty or certificate action proceedings.

The amendment only permits such a compromise settlement. It does not require it or specify conditions for its acceptability. The FAA is persuaded by the comments that some case-by-case flexibility is needed here and agrees that prosecutorial discretion should not be circumscribed by regulation. Contemporaneously with the issuance of these amendments, FAA attorneys have been advised that they are authorized to enter into civil penalty compromise settlements with no findings where they determine such settlement to be consistent with the public interest. In making such determinations, they will consider violation history as well as any other relevant factors. For example, public policy considerations would generally favor settlements without findings for inadvertent first-time violations, and disfavor such settlements where the violations were deliberate or were repetitive of, or substantially related to, violations previously adjudicated or settled, with or without a finding. In addition, the agency may, from time to time, issue policy guidance on this issue, where the agency determines that the public interest is served by insisting on findings in a certain category or type of case. But again, no inflexible criteria are being established at this time. The FAA intends to closely monitor case dispositions to evaluate continuously the need for any national policy guidance in this area.

8. Conforming Amendments and Editorial Changes

In the NPRM, the FAA proposed several conforming amendments or editorial changes to ensure that the proposed changes to the specific rules of practice raised in the NPRM were implemented effectively and efficiently. The commenters generally do not address those conforming and technical amendments, although several commenters suggest alternative solutions that the agency reviewed and adopts in certain cases.

No commenter objects to the FAA's proposed revision of the authority citation for part 13 and § 13.16(a)(1) to reflect accurately the agency's statutory authority in certain matters. To the extent that the proposed changes to the authority citation are neither addressed nor opposed by the commenters, the agency is adopting the amendments as proposed. Thus, the authority citation and the initiation procedures will reflect the agency's statutory authority in two cases: (1) The obligations and abilities of the FAA under the Federal Aviation Administration Drug Enforcement Assistance Act of 1988 (Pub. L. 100-690) and (2) the statutory maximum civil penalty of $10,000 applicable to any person who boards or attempts to board an aircraft in air transportation or intrastate air transportation with a concealed deadly or dangerous weapon on or about his or her person that would be accessible in flight. The FAA also is amending § 13.15(a)(1) so that it will be consistent with its counterpart in § 13.16(a)(1).

Related to the issue of statutory authority, the Tobacco Institute comments that § 13.15(a)(2) and § 13.16(a)(2) do not accurately reflect the provisions of section 404(d) of the Federal Aviation Act. The Tobacco

Institute states that "[t]o the extent that the rules of practice purport to allow the FAA to assess penalties greater than $1000 for violations of the Act's smoking ban, they exceed FAA's statutory authority." The Tobacco Institute recommends that the FAA revise § 13.15(a)(2) and § 13.16(a)(2) to clarify that the maximum civil penalty for a violation of section 404(d)(1) (the "smoking ban") is *$1000* and the maximum civil penalty for a violation of section 404(d)(2) (the prohibition against tampering with a lavatory smoke alarm) is *$2000*. The FAA agrees with the Tobacco Institute that a revision will clarify those sections to accurately reflect the agency's statutory authority and, thus, is revising § 13.15(a)(2) and § 13.16(a)(2) to state that the maximum civil penalty for an alleged violation of that section is specified in the Federal Aviation Act.

So that the EAJA regulations promulgated by the agency conform to the changes adopted herein to the rules of practice, the FAA is amending § 14.05(e) of part 14. That section states the "Fees may be awarded only for work performed after the issuance of *an Order of Civil Penalty*." The FAA is substituting the word "complaint" for the italicized phrase to ensure that the EAJA regulations use the same terminology as is used in the rules of practice to which they refer.

AOCI and AAAE note two typographical errors in two of the agency's proposed revisions. In § 13.218(f)(1), AOCI and AAAE believe that the phrase "10 days *of* service" should read "10 days *after* service * * * " Although the word "of" appeared in the original sentence as promulgated in August 1988, the FAA is adopting the suggested revision so the sentence in that section will conform to other sections that contain the same phrase. AOCI and AAAE also identify an error in § 13.218(f)(2)(ii) in which the proposed language states "terminates the proceedings *with* a hearing * * * " AOCI and AAAE correctly note that the italicized word should be "without" and the agency is adopting the recommendation to change that section.

9. Application of the Amendments to Pending and Concluded Civil Penalty Actions

In the summary preceding the preamble to the NPRM, the FAA indicated its willingness to consider applying changes to the rules of practice to pending civil penalty actions, "where appropriate." 55 FR 7980; March 6, 1990. During the public meeting, the agency solicited comments on whether and to what extent any changes to the rules should be applied to cases already initiated, including cases that have been resolved. Representatives of ATA, American Airlines, and Alaska Airlines spoke in response to this suggestion. Meeting Transcript at 21–22, 26, 39–40, 50–53, 66 (March 12, 1990).

Written comments were submitted by ATA, NACA, and American Airlines. ATA suggests several options to deal with cases currently in some phase of the administrative civil penalty process. Although first raised in ATA's discussion of changing the designation "order of civil penalty" to "complaint," ATA asserts that the following mechanism should be applied to all civil penalty actions under the program for all changes adopted by the FAA in this final rule.

ATA recommends the following mechanism: (1) The FAA should file amended complaints in all pending cases that have not reached trial; (2) the FAA should reopen all cases in which a respondent did not request a hearing after receiving an order of civil penalty so that the respondent has another opportunity to request a hearing; and, (3) in any case in which a trial has occurred, the case should be remanded for a new trial. ATA asserts that its proposed "remedy" would not impose substantial burdens because so few cases have been tried.

NACA suggests that the change from "order of civil penalty" to "complaint" should "embrace all of the cases that have been handled under the final rule since its adoption." Without discussing the benefits or burdens of the suggestion, NACA states that the respondent should be offered the choice to reopen a civil penalty case. At the public meeting, the representative of American Airlines recognized "the burden on the system that would happen if all cases had to be reopened." In its written comments, American Airlines recommends that the rules changes should apply to all cases in which a complaint has been filed but the case has not been litigated. American does not recommend the re-opening of all litigated or resolved cases, however. American suggests that litigated cases

> should be retried only if by applying the new rules the result could be different. Each litigant * * * should be given the opportunity to request a new hearing under the new procedures if the litigant can show that the result could be affected by evidence that was excluded under the old rules. If the litigant cannot meet its burden, then no new hearing need be granted.

American adds that any change in the agency's policy concerning the compromise of cases must apply to all pending cases.

Although the effective date of the final rule is stayed until publication of a final rule on the NPRM issued today, the FAA intends to apply all rule changes, and its change in policy with respect to compromises, prospectively to all pending cases, no matter where a case is in the process. For example, all pending cases already initiated by a notice of proposed civil penalty but which have not proceeded to an order of civil penalty (complaint), will receive the full effect of these rule changes. That means that such cases may be resolved by the payment of a civil penalty and without a formal finding of violation, under some circumstances in the discretion of the agency. That also means that should the case proceed, the agency will issue a complaint in that case, instead of an order of civil penalty. Similarly, all cases in which hearings have not yet been held will be adjudicated before an administrative law judge, and the Administrator on an appeal, if necessary, under the rules announced in this document.

The agency will not seek to amend previously-issued orders of civil penalty in pending cases simply to redenominate them as complaints. First, orders of civil penalty have been issued in over 665 cases as of the end of March 1990. In these cases, a hearing has been held, scheduled, or will be scheduled. Whatever confusion that may have been experienced by a respondent upon receipt of an order of civil penalty will have diminished at the hearing, if not sooner. The administrative burden on the agency would be substantial, without a corresponding benefit to respondents in those cases.

The agency agrees with American's suggestion in concept. The Administrator will entertain requests to remand cases pending before the Administrator on appeal from an initial decision, where the respondent demonstrates that the change in the rules of practice adopted herein would likely have affected the administrative law judge's initial decision. Similarly, the Administrator will entertain requests for reconsideration of any decision and order issued by him, on the basis that the change in the rules of practice would likely have affected the outcome of the case. Respondent must provide a particularized showing, citing the rule change (or changes) and its relevance to the findings and conclusions reached by the administrative law judge or the Administrator.

Except as indicated above, the agency does not intend to re-open cases already closed through an order assessing civil

penalty, whether or not a case was resolved before hearing or after hearing. As of March 31, 1990, over 1,800 cases had already been resolved by the issuance of an order assessing civil penalty.

The agency's change in compromise policy announced in this document, which permits a compromise without a finding of violation, will be applicable to any pending case, wherever in the process. This policy change will apply also to all cases that have been resolved by issuance of an order assessing civil penalty but in which the 60-day period for appeal or payment of the civil penalty has not yet expired. Although the agency will not entertain requests to re-open closed cases for the purpose of considering a compromise without a finding, the agency will consider, on a case-by-case basis, whether and how to use a previously-issued order assessing civil penalty in any future case.

10. Comments Beyond the Scope of the NPRM

Many of the commenters discuss general issues regarding the agency's compliance and enforcement program or policy matters in substantive regulatory areas, or note objections to other rules of practice and procedures not discussed in the NPRM. The agency is bound by the scope of its previous notice and certain policy matters clearly are outside the purview of rulemaking. The FAA is including a discussion of issues raised by the commenters in this rulemaking that are beyond the scope of this rulemaking in the NPRM published concurrently in today's **Federal Register**. Other issues that are beyond the scope of the notice issued in February 1990, because they are matters of policy or comments on the enforcement program generally, are discussed below.

a. Termination of or Opposition to the Program

Several commenters oppose the program as a general matter and advocate termination of the program by the agency or by Congress. Some commenters oppose the program as it stands now and urge the FAA to "go back and start over." Related to this issue is the desire of a few commenters for the agency to begin anew and issue an NPRM that subjects the entire rule issued in August 1988 to notice and comment. As stated previously, the FAA has republished the initiation procedures in § 13.16 and the rules of practice in subpart G of part 13 for comment by interested persons.

Three commenters (AOCI and AAAE, Rocky Mountain Helicopters) also express their belief that the program may not have been needed or necessary, although not all commenters agree. ALPA and NBAA concur in the need for an administrative procedure for these cases. Indeed, NBAA states that "the past system of waiting interminably for resolution of these cases in federal district court was unacceptable."

Several commenters either state or infer that the rules of practice "will terminate" if the FAA's civil penalty authority is not extended by Congress on or before April 30, 1990. Although stayed temporarily pursuant to the court's order, the rules of practice will survive and apply to cases where Congress has provided the FAA with separate authority to assess civil penalties administratively. As part of the Federal Aviation Administration Drug Enforcement Assistance Act of 1988 (Pub. L. 100-690), Congress included administrative civil penalty authority in the case of aircraft registration and recordation violations related to drug trafficking. This civil penalty assessment authority is identical to the authority under the "Demonstration Program," except that it is permanent. 49 U.S.C. 1471(a)(3). In addition, civil penalty assessments under the Hazardous Materials Transportation Act (49 U.S.C. 1809), like those under the Drug Enforcement Assistance Act, would continue to be subject to the same rules of practice at issue, even should the authority under section 905 of the Federal Aviation Act sunset on April 30, 1990. Letter from Gregory S. Walden, Chief Counsel, to Chairman Oberstar at 1-2 (November 11, 1989).

b. Transfer to the NTSB

At the Subcommittee hearing in November 1989, the FAA agreed to consider the issue of which forum should adjudicate the FAA's civil penalty actions. Many commenters who previously expressed no opinion on the subject now have joined the debate in favor of transferring adjudicatory jurisdiction over civil penalty actions to the NTSB. Many commenters express support for vesting adjudication of civil penalty cases in the NTSB.

Many commenters state their desire for the FAA to transfer authority to adjudicate civil penalties to the NTSB. Some commenters suggest that the FAA "assist" in transferring its authority under the statute to the NTSB. Several commenters also go so far as to suggest that it is within the FAA's power to transfer adjudication of civil penalties to the NTSB. It obviously is not, as other commenters recognize. AOPA remarks that it "may be argued that [transfer to the NTSB] will require legislation and coordination with the NTSB." ALPA states that the issue "would have to be addressed in legislation" and APA repeats that it would require "congressional vesting of adjudicatory power to the NTSB in civil penalty cases." NBAA and AOPA criticize the FAA for failing to invite comment in the NPRM on the transfer of civil penalty adjudicatory functions to the NTSB. However, in one commenter's words, the issue is "outside the scope of the present rulemaking." It is beyond the agency's authority to transfer its adjudicatory functions by rulemaking or any other administrative mechanism. Simply stated, the FAA cannot expand unilaterally the NTSB's statutory jurisdiction to review or adjudicate FAA enforcement actions. Thus, it matters little whether this issue was raised by the agency in its NPRM. Congress, not the FAA or the NTSB, ultimately must resolve the debate.

c. Ability of the FAA Decisionmaker to Raise New Issues on Appeal

NACA, American Airlines, and one private attorney, object to the current language of § 13.233(j)(1), which permits the FAA decisionmaker to raise any issue, *sua sponte*, that is required for proper disposition of the proceedings. Other commenters, including AOPA and the California Aviation Council, raised this issue previously in comments to the final rule issued in August 1988. Although the rule provides that the FAA decisionmaker will give the parties a reasonable opportunity to submit *arguments* on a new issue before making any decision on appeal, these commenters object to the fact that the rule does not allow the respondent an opportunity to submit *evidence* and develop the record with respect to the "new" issue raised by the decisionmaker on appeal. In addition, NACA asserts that the rule violates section 554(b)(3) of the Administrative Procedure Act, which requires that persons entitled to notice of an agency hearing shall be timely informed of the matters of fact and law asserted.

For a few commenters, this perception persists although § 13.233(j)(1) was neither intended nor has it been used to allow the Administrator to consider matters outside the record developed before the administrative law judge. Section 556(e) and section 557(b) of the Administrative Procedure Act restrain a decisionmaker, both at the hearing and appellate level, from considering matters outside the record. This provision provided the Administrator with the latitude only to consider issues, developed during an administrative

proceeding and contained in the record, that may not have been raised or relied upon by the parties in their appellate arguments, but which could be dispositive of the appeal before the decisionmaker. As such, the rule applied equally to respondents and the agency and did not operate, either explicitly or implicitly, to allow the Administrator to "rectify mistakes and oversights" by agency attorneys at the hearing, as one commenter has asserted.

The FAA believes that the rules of practice, as currently written, adequately protect the parties. The Administrator, as the FAA decisionmaker, already has the authority to remand a case "for any proceedings that the FAA decisionmaker determines may be necessary" pursuant to § 13.233(j). The agency is confident that the Administrator will exercise this authority in all appropriate cases, including those rare occasions where a "new" issue raised on appeal requires consideration of additional evidence or testimony.

However, in order to remove any doubt on this point and to assuage the concerns of these commenters, the agency is adding new language to § 13.233(j)(1), which makes clear that if an issue raised on the FAA decisionmaker's own initiative requires consideration of additional evidence or testimony, the FAA decisionmaker will remand the case to the administrative law judge for further proceedings and an initial decision related to that issue. This change will ensure that the parties are given an opportunity to develop a full evidentiary record on all such issues.

A remand for further evidence or testimony normally will not be required where the "new" issue raised is purely a legal one, or where the issue was sufficiently addressed at the hearing below but was not covered in the briefs on appeal, and § 13.233(j)(1) now so states. In such cases, the notice requirement of the Administrative Procedure Act will be met by providing the parties with an opportunity to submit written arguments to the Administrator. Of course, the Administrator's determination as to whether a remand is required under the revised rule would be subject to judicial review in a U.S. court of appeals if the agency's final decision is appealed.

d. Equal Access to Justice Act

Two commenters continue to complain that the civil penalty program and the rules of practice are inadequate because they fail to address the applicability of EAJA to the agency's civil penalty cases. As part of a comparison of the FAA and NTSB rules, one commenter notes that EAJA regulations are "conspicuously absent in the current civil penalty rules." The commenter believes that this "omission" reflects that the civil penalty rules "are still heavily one-sided in favor of the FAA and replete with provisions unfavorable to any unfortunate respondent subject to them."

The FAA issued an NPRM, requesting comment on proposed EAJA regulations, on July 10, 1989. 54 FR 29978; July 17, 1989. Four comments were received on the NPRM and considered by the agency before promulgation of an interim final rule. The FAA issued an interim final rule implementing EAJA regulations on October 27, 1989. 54 FR 46196; November 1, 1989. The interim final rule is effective until such time as the Department-wide EAJA regulations are updated and incorporate the civil penalty adjudications before the agency. The agency's EAJA regulations are contained in Part 14 of the Federal Aviation Regulations.

e. Comments on Substantive Areas of Regulation and the Agency's Compliance and Enforcement Program

Several entities and individuals used the opportunity for comment on the NPRM to espouse positions on issues of interest to them. Most of these issues, although superficially related to the rules of practice, clearly are beyond the scope of this rulemaking.

For example, NATA recommends several modifications to "enhance the compliance process" and promote an operator's understanding of the agency's compliance and enforcement program. NATA and the joint comments of AOCI and AAAE both express concern about how airport operator security violations are handled by the FAA, and specifically address the issue of an airport operator's potential liability for violations committed by tenants at the airport. At the public meeting, Alaska Airlines and NBAA discussed the current "environment" and "perspectives" of certain members of the aviation community with respect to a compliance and enforcement program. Both commenters stress the desire for emphasis on "voluntary compliance" with the FAA's safety regulations in any enforcement program. Last, ATA states that the civil penalty program will not work "until the agency creates sensible enforcement priorities." ATA suggests that the FAA adopt a leadership role in developing a consensus on the "appropriate uses" of the civil penalty program. Like Alaska Airlines, ATA objects to the agency's policy regarding FAA tests conducted to determine an air carrier's detection of simulated weapons at carrier screening checkpoints and any enforcement actions that arise from a carrier's failure to detect a simulated weapon.

Many of these comments express concerns that should be raised in other agency rulemaking actions. Some comments express concern about broad substantive areas that are more appropriately addressed by the agency in the normal course as a matter of policy than rulemaking. There are more appropriate and more efficient avenues for consideration of these issues than the FAA's NPRM on the rules of practice in civil penalty proceedings. Because these issues are beyond the scope of the NPRM, both technically and practically, they cannot and should not be addressed in this rulemaking, which is intended only to make specific changes to procedural rules of practice.

f. Comments on Sections of the Rules not Raised in the NPRM

A few commenters object to other sections of the rules that were not raised in the NPRM issued in February 1990. Although several of those objections have merit, they are beyond the scope of this rulemaking. Nevertheless, the agency is requesting comment on those issues in the NPRM published in a separate part of today's **Federal Register**. As such, the FAA is not amending the rules of practice as suggested by the commenters because other interested persons did not have an opportunity to review the relevant sections and any proposed revisions or discussion submitted by the commenters. While the FAA is not including a specific proposal on several of these issues in the NPRM, the agency is soliciting comment on the issues from interested parties to expedite the rulemaking.

Regulatory Evaluation

The FAA has determined that this final rule is not a major rule under the criteria of Executive Order 12291; thus, the FAA is not required to prepare a Regulatory Impact Analysis under either the Executive Order or the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979).

In nonmajor rulemaking actions, the DOT Regulatory Policies and Procedures require the FAA to prepare a regulatory evaluation, analyzing the economic consequences of proposed regulations and quantifying, to the extent practicable, the estimated costs and anticipated benefits and impacts of regulations. The FAA believes that the

changes to the rules of practice adopted in this document, aimed primarily at the appearance of fairness, do not in any economic terms significantly alter the basic process by which civil penalties not exceeding $50,000 are adjudicated within the agency. Rather, these changes address only those sections of the rules of practice that have been the subject of criticism and specific comment by the aviation industry. For example, the amended sections of the rules of practice change the designation of a document filed in civil penalty actions, expand certain sections of the rules to reflect existing statutes or regulations, eliminate provisions perceived by some to favor the agency, and expand the discretion of an administrative law judge in several areas.

The FAA did not identify, and the commenters did not provide, any specific economic consequences that can be attributed to the procedural changes adopted in this final rule. The FAA anticipates that the changes adopted herein will not result in any costs to respondents or the agency. However, adoption of the changes in the final rules could generate cost-relieving benefits to the agency and respondents, although to what extent has not been determined. If there are any costs or benefits associated with the changes to specific sections of the rules, the FAA expects their value, if any, to be minimal under the criteria of applicable Executive Orders, statutes, or regulations. Since there are no costs expected to accrue from this rule and only minimal benefits expected, the FAA is not required to prepare a full regulatory evaluation of the changes adopted in this final rulemaking document.

Nevertheless, the agency reviewed the amendments adopted herein to determine if there were any economic consequences attributable to adopting the proposals in the NPRM. The FAA specifically requested that the commenters discuss any economic consequences so that the FAA could prepare, if necessary, a full regulatory evaluation of the changes to the rules of practice or the agency's policies. With the exception of NBAA's limited comment on the issue of submission of written arguments, the commenters did not submit for the agency's review any data regarding potential costs or expected benefits and impacts of any changes or proposals in the NPRM or suggestions made by the commenters.

The commenters did not discuss any significant economic impact, positive or negative, on small entities, as those terms are defined in the Regulatory Flexibility Act of 1980, that would arise by adopting the proposals in the NPRM. Commenters also failed to note any expected impact on trade opportunities for U.S. firms operating outside the United States or foreign firms operating within the United States. As anticipated in the NPRM, the FAA believes that neither small entities nor trade opportunities for businesses will be affected by amendment of the rules of practice as discussed herein. The commenters did not identify or discuss any Federalism issues that may be adversely affected if the proposals were adopted. It was the FAA's preliminary opinion in the NPRM and current opinion in this final rule that the changes adopted by the FAA do not have sufficient Federalism implications to warrant preparation of a Federalism Assessment under the criteria of Executive Order 12612.

Conclusion

The FAA has determined that the final rule is not a major regulation under the criteria of Executive Order 12291 and, thus, this rulemaking action does not warrant preparation of a Regulatory Impact Analysis. The FAA also certifies that the changes adopted in this final rule will not have a significant economic impact, positive or negative, on a substantial number of small entities. Because neither the FAA nor the commenters have identified any specific economic consequences associated with the changes, and the agency expects little or no cost or benefit to accrue from the changes, preparation of a full regulatory evaluation is not required. Because of the interest expressed by the public on the rules of practice, the FAA has determined that this final rule is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979).

List of Subjects

14 CFR Part 13

Enforcement procedures, Investigations, Penalties.

14 CFR Part 14

Equal access to justice, Lawyers.

The Amendments

Accordingly, the FAA amends part 13 and part 14 of the Federal Aviation Regulations (14 CFR parts 13, 14) as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

1. The authority citation for part 13 is revised to read as follows:

Authority: 49 U.S.C. App. 1354 (a) and (c), 1374(d), 1401–1406, 1421–1428, 1471, 1475, 1481, 1482 (a), (b), and (c), and 1484–1489, 1523 (Federal Aviation Act of 1958) (as amended, 49 U.S.C. App. 1471(a)(3) (Federal Aviation Administration Drug Enforcement Assistance Act of 1988); 49 U.S.C. App. 1475 (Airport and Airway Safety and Capacity Expansion Act of 1987); 49 U.S.C. App. 1655(c) (Department of Transportation Act, as revised, 49 U.S.C. 106(g)); 49 U.S.C. 1727 and 1730 (Airport and Airway Development Act of 1970); 49 U.S.C. 1808, 1809, and 1810 (Hazardous Materials Transportation Act); 49 U.S.C. 2218 and 2219 (Airport and Airway Improvement Act of 1982); 49 U.S.C. 2201 (as amended, 49 U.S.C. App. 2218, Airport and Airway Safety and Capacity Expansion Act of 1987)); 18 U.S.C. 6002 and 6004 (Organized Crime Control Act of 1970); 49 CFR 1.47 (f), (k), and (q) (Regulations of the Office of the Secretary of Transportation).

2. Section 13.15 (a)(1) and (a)(2) are revised to read as follows:

§ 13.15 Civil penalties: Federal Aviation Act of 1958, as amended, involving an amount in controversy in excess of $50,000; an in rem action; seizure of aircraft; or injunctive relief.

(a) * * *

(1) Any person who violates any provision of Title III, V, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*).

(2) Any person who violates section 404(d) of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 404(d) or section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1374, 1471, *et seq.*).

* * * * *

3. Section 13.16 is amended by revising paragraphs (a)(1), (a)(2), (c), (e)(3), (g)(3), (h), (l), (m), and (p) to read as follows:

§ 13.16 Civil Penalties: Federal Aviation Act of 1958, involving an amount in controversy not exceeding $50,000; Hazardous Materials Transportation Act.

(a) * * *

(1) Any person who violates any provision of Title III, V, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 901

of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*).

(2) Any person who violates section 404(d) of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 404(d) or section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1374, 1471, *et seq.*).

* * * * *

(c) The authority of the Administrator, under sections 901 and 905 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act, to initiate and assess civil penalties for a violation of those Acts, or a rule, regulation, or order issued thereunder, is delegated to the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center. The authority of the Administrator to refer cases to the Attorney General of the United States, or the delegate of the Attorney General, for the collection of assessed civil penalties, is delegated to the Chief Counsel, the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center.

* * * * *

(e) * * *

(3) The person shall request a hearing, pursuant to paragraph (i) of this section, in which case a complaint shall be issued and shall be filed with the hearing docket clerk.

* * * * *

(g) * * *

(3) The person shall request a hearing, pursuant to paragraph (i) of this section, in which case a complaint shall be issued and shall be filed with the hearing docket clerk.

(h) *Complaint.* A complaint shall be issued if the person charged with a violation requests a hearing in accordance with paragraph (e)(3) or (g)(3) of this section.

* * * * *

(l) *Hearing.* If the person charged with a violation requests a hearing pursuant to paragraph (e)(3) or paragraph (g)(3) of this section, a complaint shall be issued and shall be filed with the hearing docket clerk. The procedural rules in subpart G of this part apply to the hearing and any appeal. At the close of the hearing, the administrative law judge shall issue, either orally on the record or in writing, an initial decision, including the reasons for the decision, that contains findings or conclusions on the allegations contained, and the civil penalty sought, in the complaint. The initial decision issued by the administrative law judge shall become an order assessing civil penalty if a party does not appeal the administrative law judge's initial decision to the FAA decisionmaker.

(m) *Appeal.* Either party may appeal the administrative law judge's initial decision to the FAA decisionmaker pursuant to the procedures in subpart G of this part. If a party files a notice of appeal pursuant to § 13.233 of subpart G, the effectiveness of the initial decision is stayed until a final decision and order of the Administrator has been entered on the record. The FAA decisionmaker shall review the record and issue a final decision and order of the Administrator that affirms, modifies, or reverses the initial decision. The FAA decisionmaker shall not assess a civil penalty in an amount greater than the amount stated in the complaint.

* * * * *

(p) *Compromise.* The Administrator may compromise any civil penalty, assessed in accordance with sections 901 and 905 of the Federal Aviation Act of 1958, as amended, involving an amount in controversy not exceeding $50,000, or any civil penalty assessed in accordance with section 901 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act, at any time prior to referring the order assessing civil penalty to the United States Attorney for collection. A civil penalty compromise may include an agreement that the agency makes no finding of a violation, in which case the order assessing civil penalty shall be entitled "order assessing civil penalty/settlement without finding of violation." The order shall expressly provide that the agency makes no finding of a violation and the compromise agreement is not admissible as evidence of a prior violation in any subsequent civil penalty proceeding or certificate action proceeding.

4. Section 13.201 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 13.201 Applicability.

(a) * * *

(1) A civil penalty action in which a complaint has been issued for an amount not exceeding $50,000 for a violation arising under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), or a rule, regulation, or order issued thereunder.

(2) A civil penalty action in which a complaint has been issued for a violation arising under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*) and the Hazardous Materials Transportation Act (49 U.S.C. 1801, *et seq.*), or a rule, regulation, or order issued thereunder.

* * * * *

5. Section 13.202 is amended by removing the definition "Order of Civil Penalty" and by revising the definitions of "Agency attorney," "Complaint," "Order assessing civil penalty," "Party," and "Respondent" to read as follows:

§ 13.202 Definitions.

* * * * *

Agency attorney means the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Assistant Chief Counsel for a region or center, or an attorney on the staff of the Assistant Chief Counsel for Regulations and Enforcement or the Assistant Chief Counsel for a region or center who prosecutes a civil penalty action. An agency attorney shall not include the Chief Counsel, the Assistant Chief Counsel for Litigation, or any attorney on the staff of the Assistant Chief Counsel for Litigation who advises the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker or who is supervised in that action by a person who provides such advice in a civil penalty action.

* * * * *

Complaint means a document issued by an agency attorney alleging a violation of the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder, which has been filed with the hearing docket after a hearing has been requested pursuant to § 13.16(e)(3) or § 13.16(g)(3) of this part.

* * * * *

Order assessing civil penalty means an order issued by an agency attorney, or an initial decision issued by an administrative law judge that is not appealed to the FAA decisionmaker, that directs a person to pay a civil penalty.

Party means the agency attorney, or the respondent named in a complaint.

* * * * *

Respondent means a person to whom a civil penalty is directed and who has received a complaint.

6. Section 13.203 is revised to read as follows:

§ 13.203 Separation of functions.

(a) Civil penalty proceedings, including hearings, shall be prosecuted by an agency attorney.

(b) An FAA employee engaged in the performance of investigative or prosecutorial functions in a civil penalty action shall not, in that case or a factually-related case, participate or give advice in a decision by the administrative law judge or by the FAA decisionmaker on appeal, except as counsel or a witness in the public proceedings.

(c) The Chief Counsel, the Assistant Chief Counsel for Litigation, or attorneys on the staff of the Assistant Chief Counsel for Litigation will advise the FAA decisionmaker regarding an initial decision or any appeal of that civil penalty action to the FAA decisionmaker.

7. Section 13.208 is amended by revising paragraph (a) to read as follows:

§ 13.208 Complaint.

(a) The agency attorney shall serve the original complaint on the person requesting the hearing.

* * * * *

8. Section 13.209 is amended by revising paragraphs (a), (d), and (f) to read as follows:

§ 13.209 Answer.

(a) *Writing required.* A person who receives a complaint shall file a written answer to the complaint, or a motion pursuant to § 13.218(f) (1) through (4) of this subpart, not later than 30 days after service of the complaint. The answer may be in the form of a letter but must be dated and signed by the person responding to the complaint. An answer may be typewritten or may be legibly handwritten.

* * * * *

(d) *Specific denial of allegations required.* A person filing an answer shall admit, deny, or state that the person is without sufficient knowledge or information to admit or deny each allegation in each numbered paragraph of the complaint. A general denial of the complaint is deemed a failure to file an answer. Any statement or allegation contained in the complaint that is not specifically denied in the answer is deemed an admission of the truth of that allegation.

* * * * *

(f) *Failure to file answer.* A person's failure to file an answer without good cause is deemed an admission of the truth of each allegation contained in the complaint and an order assessing civil penalty shall be issued.

9. Section 13.218 is amended by revising paragraph (f)(1), the introductory text of paragraph (f)(2) and paragraphs (f)(2)(ii) and (f)(3) to read as follows:

§ 13.218 Motions.

* * * * *

(f) * * *

(1) *Motion to dismiss for insufficiency.* A party may file a motion to dismiss the complaint for insufficiency instead of an answer. If the administrative law judge denies the motion to dismiss the complaint for insufficiency, the party who received the complaint shall file an answer not later than 10 days after service of the administrative law judge's denial of the motion. A motion to dismiss the complaint for insufficiency must show that the complaint fails to state a violation of the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or a violation of the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder.

(2) *Motion to dismiss.* A party may file a motion to dismiss a complaint instead of an answer, specifying the grounds for dismissal.

* * * * *

(ii) If the administrative law judge grants a motion to dismiss and terminates the proceedings without a hearing, the agency attorney may file an appeal pursuant to § 13.233 of this subpart. If the administrative law judge grants a motion to dismiss in part, the agency attorney may appeal the administrative law judge's decision to dismiss part of the complaint under the provisions of § 13.219(c) of this subpart. If required by the decision on appeal, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the decision on appeal.

(3) *Motion for more definite statement.* A party may file a motion for more definite statement of any pleading which requires a response under this subpart. A party shall set forth, in detail, the indefinite or uncertain allegations contained in a complaint or response to any pleading and shall submit the details that the party believes would make the allegation or response definite and certain.

(i) *Complaint.* A party may file a motion requesting a more definite statement of the allegations contained in the complaint instead of an answer. If the administrative law judge grants the motion, and the agency attorney does not supply a more definite statement not later than 15 days after service of the order granting the motion, the administrative law judge shall strike the allegations in the complaint to which the motion is directed. If the administrative law judge denies the motion, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the order of denial.

(ii) *Answer.* A party may file a motion requesting a more definite statement if an answer fails to clearly respond to the allegations in the complaint. If the administrative law judge grants the motion, the respondent shall supply a more definite statement not later than 15 days after service of the ruling on the motion. If the respondent fails to supply a more definite statement, the administrative law judge shall strike those statements in the answer to which the motion is directed. A party's failure to supply a more definite statement is deemed a failure to answer and the unanswered allegations in the complaint are deemed admitted.

* * * * *

10. Section 13.219 is amended by revising paragraph (c)(4) to read as follows:

§ 13.219 Interlocutory appeals.

* * * * *

(c) * * *

(4) A ruling by the administrative law judge granting, in part, a respondent's motion to dismiss a complaint pursuant to § 13.218(f)(2)(ii).

* * * * *

11. Section 13.220 is amended by revising paragraph (l)(3) to read as follows:

§ 13.220 Discovery.

* * * * *

(l) * * *

(3) *Effect of admission.* Any matter admitted or deemed admitted under this section is conclusively established for the purpose of the hearing and appeal.

* * * * *

12. Section 13.227 is revised to read as follows:

§ 13.227 Expert or opinion witnesses.

An employee of the agency may not be called as an expert or opinion witness, for any party other than the agency, in any proceeding governed by this subpart. An employee of a respondent may not be called by an agency attorney as an expert or opinion witness for the agency in any proceeding governed by this subpart to which the respondent is a party.

13. Section 13.231 is revised to read as follows:

§ 13.231 Argument before the administrative law judge.

(a) *Arguments during the hearing.* During the hearing, the administrative law judge shall give the parties a reasonable opportunity to present arguments on the record supporting or opposing motions, objections, and rulings if the parties request an opportunity for argument. The administrative law judge may request written arguments during the hearing if the administrative law judge finds that submission of written arguments would be reasonable.

(b) *Final oral argument.* At the conclusion of the hearing and before the administrative law judge issues an initial decision in the proceedings, the parties are entitled to submit oral proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. At the conclusion of the hearing, a party may waive final oral argument.

(c) *Posthearing briefs.* The administrative law judge may request written posthearing briefs before the administrative law judge issues an initial decision in the proceedings if the administrative law judge finds that submission of written arguments would be reasonable. If a party files a written posthearing brief, the party shall include proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. The administrative law judge shall give the parties a reasonable opportunity, not more than 30 days after receipt of the transcript, to prepare and submit the briefs.

14. Section 13.232 is revised to read as follows:

§ 13.232 Initial decision.

(a) *Contents.* The administrative law judge shall issue an initial decision at the conclusion of the hearing. In each oral or written decision, the administrative law judge shall include findings of fact and conclusions of law, and the grounds supporting those findings and conclusions, upon all material issues of fact, the credibility of witnesses, the applicable law, any exercise of the administrative law judge's discretion, the amount of any civil penalty found appropriate by the administrative law judge, and a discussion of the basis for any order issued in the proceedings. The administrative law judge is not required to provide a written explanation for rulings on objections, procedural motions, and other matters not directly relevant to the substance of the initial decision. If the administrative law judge refers to any previous unreported or unpublished initial decision, the administrative law judge shall make copies of that initial decision available to all parties and the FAA decisionmaker.

(b) *Oral decision.* Except as provided in paragraph (c) of this section, at the conclusion of the hearing, the administrative law judge shall issue the initial decision and order orally on the record.

(c) *Written decision.* The administrative law judge may issue a written initial decision not later than 30 days after the conclusion of the hearing or submission of the last posthearing brief if the administrative law judge finds that issuing a written initial decision is reasonable. The administrative law judge shall serve a copy of any written initial decision an each party.

(d) *Order assessing civil penalty.* The initial decision issued by the administrative law judge shall become an order assessing civil penalty if the administrative law judge finds that an alleged violation occurred and determines that a civil penalty, in an amount found appropriate by the administrative law judge, is warranted.

15. Section 13.233 is amended by revising paragraph (j)(1) to read as follows:

§ 13.233 Appeal from initial decision.

* * * * *

(j) * * *

(1) The FAA decisionmaker may raise any issue, on the FAA decisionmaker's own initiative, that is required for proper disposition of the proceedings. The FAA decisionmaker will give the parties a reasonable opportunity to submit arguments on the new issues before making a decision on appeal. If an issue raised by the FAA decisionmaker requires the consideration of additional testimony or evidence, the FAA decisionmaker will remand the case to the administrative law judge for further proceedings and an initial decision related to that issue. If an issue raised by the FAA decisionmaker is solely an issue of law or the issue was addressed at the hearing but was not raised by a party in the briefs on appeal, a remand of the case to the administrative law judge for further proceedings is not required but may be provided in the discretion of the FAA decisionmaker.

* * * * *

PART 14—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

16. The authority citation for part 14 is revised to read as follows:

Authority: 5 U.S.C. 504 (Equal Access to Justice Act); 49 U.S.C. App. 1354(a) and (c) (Department of Transportation Act, as revised, 49 U.S.C. 106(g)).

17. Section 14.05 is amended by revising paragraph (e) to read as follows:

§ 14.05 Allowance fees and expenses.

* * * * *

(e) Fees may be awarded only for work performed after the issuance of a complaint.

Issued in Washington, DC, on April 17, 1990.

James B. Busey,

Administrator.

[FR Doc. 90-9174 Filed 04-17-90; 12:23 pm]

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Friday
April 20, 1990

Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Part 13
Rules of Practice for FAA Civil Penalty Actions; Notice of Proposed Rules

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 13

[Docket No. 25690; Notice No. 90-13]

Rules of Practice for FAA Civil Penalty Actions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice invites public comment on the rules of practice regarding the FAA's civil penalty authority in actions not exceeding $50,000 for a violation of the Federal Aviation Act of 1958, or any rule, regulation, or order issued thereunder, and in actions regardless of amount for a violation of the Hazardous Materials Transportation Act, or any rule, regulation or order issued thereunder. In accordance with a decision of the U.S. Court of Appeals for the District of Columbia Circuit, on April 13, 1990, the FAA is publishing the initiation procedures and the rules of practice in their entirety for public comment by interested persons.

DATES: Written comments on the notice of proposed rulemaking must be received on or before May 21, 1990

ADDRESSES: Written comments, in triplicate, on this notice may be mailed or delivered to the Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-10), Room 915G, Docket No. 25690, 800 Independence Avenue SW., Washington, DC 20591. Comments submitted on the notice must be marked "Docket No. 25690." Comments may be inspected in the Rules Docket (room 915G) between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Denise Daniels Ross, Special Counsel to the Chief Counsel (AGC-3), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-3773.

SUPPLEMENTARY INFORMATION

Comments Invited

This notice of proposed rulemaking (NPRM) is issued to solicit broad public participation in rulemaking proceedings on specific areas of the rules of practice in civil penalty proceedings. Interested persons are invited to participate in this rulemaking proceeding by submitting such written data, views, or arguments as they may desire. Comments must identify the regulatory docket number or notice number of this document and must be submitted in triplicate to the address listed above. All comments received on or before the closing date for comments will be considered before taking further rulemaking action. Persons wishing the FAA to acknowledge receipt of their comments must submit with their comments a preaddressed postcard on which the following statement is made: "Comments to Docket No. 25690." The postcard will be date and time stamped and returned to the commenter. All comments submitted in response to this notice will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with FAA personnel involved in this rulemaking will be filed in the docket.

Availability of the NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center (APA-430), 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the notice number of this NPRM. Persons interested in being placed on the mailing list for future NPRMs also should request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Background

On August 31, 1988, by final rule, the FAA promulgated rules of practice (53 FR 34646; Sept. 7, 1988) for civil penalty actions conducted under a statutory amendment (Pub. L. 00-223; Dec. 30, 1987) to the Federal Aviation Act of 1958, as amended. That amendment empowers the Administrator to assess civil penalties, not to exceed $50,000, for violations of the Federal Aviation Act and the FAA's safety regulations promulgated thereunder. Under this authority, a civil penalty may be assessed only after notice and an opportunity for a hearing on the record. In the final rule, the FAA invited interested persons to comment on the rules of practice.

On March 17, 1989, the FAA issued a detailed disposition of the 20 comments submitted on the rules of practice, responding to the commenters' objections to specific provisions of the rules of practice. 54 FR 11914; March 22, 1989. In the disposition of comments, the agency explained the purpose of the rules of practice and discussed its expectations of the manner in which cases would proceed under those rules.

The Air Transport Association of America (ATA) filed a petition for review in the United States Court of Appeals for the District of Columbia (No. 89-1195), challenging the agency's promulgation of the final rule and the rules of practice for civil penalty actions. Several persons in their individual capacity, the Aircraft Owners and Pilots Association (AOPA), the National Air Carrier Association (NACA), the Air Line Pilots Association (ALPA), and America West intervened in support of ATA's petition for review.

On April 13, 1990, the court of appeals issued its decision in *Air Transport Association* v. *Department of Transportation*. In a 2-1 decision, the court agreed with the petitioner that the FAA was obliged by section 553 of the Administrative Procedure Act to provide notice and comment before the rules of practice in civil penalty actions were promulgated. The court held that the *procedural* challenge to promulgation of the rules of practice in August 1988 was ripe for review and granted the petition for review on that ground. The court expressed no opinion on the ripeness or the merits of the Air Transport Association's several substantive challenges to the rules of practice.

The court ordered the FAA "not to initiate further prosecutions * * * until the agency has engaged in further rulemaking in accord with section 553." Slip op. at 21. In the exercise of its "equitable remedial powers," the court stated, "[T]he FAA is free to hold *pending* cases in abeyance while it engages in further rulemaking. If and when the FAA promulgates a final rule for adjudication of administrative penalty actions, it may then resume prosecution of these cases." *Id.* at 20-21.

In accordance with the court's decision, all FAA prosecuting attorneys will hold in abeyance all civil penalty cases initiated under the rules of practice and will not initiate any notice of proposed civil penalty until further notice. They also will not proceed even with informal procedures, such as informal conferences, until further notice. Chief Administrative Law Judge Mathias, of the Office of Hearings of the Department of Transportation, has also requested the administrative law judges to postpone hearings that had been scheduled and not to schedule any future hearings until further notice. The FAA and the Office of Hearings of the Department of Transportation will make every effort to notify all persons whose cases are pending of the court's

decision, whether or not a hearing has been held, scheduled, or not yet scheduled.

Because all proceedings under the rules of practice have been suspended as a result of the court's decision, the agency intends to move expeditiously with this rulemaking. Therefore, the agency requests public comments within 30 days. The agency believes a 30-day comment period is reasonable, given the familiarity of the aviation community with the current (and proposed) rules of practice, and the several previous opportunities the public has had to comment on these rules. The agency also believes that good cause exists to make any rules of practice, as may be adopted or amended following public comment, immediately effective upon publication of a final rule, and so intends at this time. The court's decision permits the FAA to "resume prosecution of [pending] cases" upon promulgation of a final rule, slip op. at 21, and the agency believes that immediate implementation of rules of practice on publication of a final rule in the **Federal Register** will serve the interests all parties share in fairness and expedition. The FAA intends to republish the entire initiation procedures and any rules of practice adopted in a final rule because the FAA distributes the **Federal Register** document to those charged with an alleged violation.

Discussion

In its opinion, the court stated that "Insofar as the FAA's pending notice of proposed rulemaking [issued on February 28, 1990 (55 FR 7980; March 6, 1990)] seeks public comment on the individual Rules that the agency intends to amend, the agency may rely on the outcome of that rulemaking as a partial fulfillment of this mandate." Slip op. at 20. Concurrently with the issuance of this NPRM, the FAA has published in a separate part of today's **Federal Register** a final rule, adopting changes to specific rules of practice. The rules of practice, published herein for comment, include the changes adopted pursuant to that final rule. In light of the court's decision, the FAA has suspended the effective date of the changes to the rules of practice contained in the final rule, pending further notification in the **Federal Register.**

Several commenters to the NPRM issued in February 1990, in addition to addressing the issues raised in the notice, also express opinions on other sections of the rules of practice that are outside the scope of that notice. Generally, the FAA is not including specific proposals here or adopting additional suggested changes to other rules of practice because other interested persons did not have an opportunity to review the relevant sections and any proposed revisions or discussion submitted by the commenters. Nevertheless, these comments indicate concern with other sections of the rules that heretofore may not have been raised by previous commenters. In this NPRM, the FAA has presented those concerns and solicits comment on those issues as well as on any other issues presented by the rules of practice proposed in this document.

1. *Limitations period.* Six commenters (ALPA, Experimental Aircraft Association (EAA), ATA, Allied Pilots Association (APA), NACA, and one private attorney) want the FAA to adopt a time limit within which the agency would be required to initiate a notice of proposed civil penalty after an alleged violation of the Federal Aviation Regulations has occurred. EAA suggests that the FAA "modify" section 901 of the Federal Aviation Act (49 U.S.C. App. 1471) to incorporate a time limit. Of course, the agency does not have the authority unilaterally to modify any statute.

NACA, ALPA, EAA, and APA note the NTSB's stale complaint rule (49 CFR 821.33), which requires the FAA to initiate a certificate action against an airman within six months of the alleged violation. A certificate action brought against an airman more than six months after the alleged violation may be dismissed by the NTSB unless the FAA can demonstrate good cause for the delay, or unless the airman's qualifications to hold an airman certificate are at issue.

APA suggests that the FAA simply adopt the NTSB rule, while other commenters suggest that the FAA adopt a 6-month time limit with regard to the initiation of all enforcement actions. These commenters assert that an enforcement action initiated more than six months after an alleged violation is unfair, primarily because the "ability to preserve evidence is seriously compromised" after more than six months.

This suggestion was initially made in comments to the rules of practice promulgated in August 1988. In its disposition of those comments, the agency noted that, in the absence of any specific limitations period in the Federal Aviation Act or the Hazardous Materials Transportation Act, 28 U.S.C. 2462 provides a 5-year period. 54 FR 11919; March 22, 1989. That section provides in pertinent part:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued[.]

At the time, the agency declined to adopt a shorter time period by regulation, concluding that such a regulation "is not necessary to carry out its enforcement responsibilities." 54 FR at 11919–11920.

The FAA recognizes that there may be some merit to a provision that would require the agency to bring a civil penalty within a period shorter than five years. One of the main purposes of the administrative assessment of civil penalties is to avoid the lengthy process that can result when the FAA refers a case to a U.S. Attorney. The FAA has always stated that such a process, which often takes years to be resolved, serves neither the public interest nor the interests of the respondent. The interests of both aviation safety and those regulated by the FAA are best served when action taken by the FAA is expeditious.

Expeditious initiation of a case, however, often is hampered by the agency's limited resources and competing priorities. Given this reality, the agency must strike a balance between the public's interest in having the FAA prosecute violations of its safety regulations, and a respondent's interest in fair and expeditious adjudication of an action. There are many important safety considerations and policy issues that must be explored before the FAA would issue a regulation that mandates a time limit for agency initiation of enforcement actions. Indeed, NACA and ATA state that the FAA should issue an NPRM on the subject.

Notwithstanding the general 5-year limitation period set by Congress, nothing currently prevents a respondent who believes it has been prejudiced by the agency's delay in initiating the case from asserting such prejudice as a defense in an administrative hearing. The agency believes it is within the province and authority of an administrative law judge under section 555(b) of the Administrative Procedure Act to dismiss an action if the respondent demonstrates actual prejudice as a result of the agency's unreasonable delay in initiating enforcement action. That section provides, "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." In applying section 555(b), the

courts have applied a standard of undue delay by the government and prejudice to the respondent. *See, e.g., EEOC* v. *Exchange Security Bank*, 529 F.2d 1214 (5th Cir. 1976); *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745 (5th Cir. 1972); *EEOC* v. *Bell Helicopter*, 426 F. Supp. 785, 792 (N.D. Tex. 1976). Consequently, if a respondent were unable adequately to defend against the FAA's allegations because documents are inadvertently destroyed or witnesses become unavailable due to the agency's delay in initiating a case, the respondent could petition the administrative law judge to dismiss the action, or a portion thereof, on the basis of such prejudice.

While the agency is not prepared at this time to propose specifically a shorter limitations period than that provided by statute, the agency is soliciting comment on this issue from interested parties to allow it to amend the rules of practice in response to comment in this rulemaking. Commenters are asked to state the comparative benefits of a specific time period provision versus a provision that would codify the undue delay and prejudice standard used by administrative agencies and courts pursuant to the Administrative Procedure Act. If a specific time period is supported, commenters should address how the specific time period recommended fits the purpose of a limitations period and offer examples, if any, where the initiation of a case outside of the recommended period resulted in prejudice to a respondent in a civil penalty action, before the FAA or any other agency. Commenters should discuss whether receipt of a letter of investigation within a relatively brief time period would obviate a period of limitations in which a notice of civil penalty must be issued. The commenters should also address the critical date from which the period would run (i.e., the date of alleged violation, the date of discovery of the alleged violation, or some other date), and the critical event which must be taken within the time period (i.e., issuance of notice of proposed civil penalty, letter of investigation). Finally, commenters should discuss whether there would be any circumstances whereby the agency's failure to bring an action within the time specified would be excused.

2. *Verification of pleadings.* A private attorney objects to § 13.220(k)(1) that provides, in pertinent part:

> A party shall answer each interrogatory separately and completely in writing and under oath. A party's attorney may sign the response to the interrogatories if the attorney has verification of authority to sign from the party.

This commenter states that it is common practice in NTSB proceedings for FAA attorneys to sign pleadings on behalf of the agency without an accompanying verification of authorization. The commenter states that, under this section of the FAA's rules, a respondent is required to respond to interrogatories under oath but the agency is not. The commenter suggests that the agency amend § 13.220(k)(1) so that neither party is required to verify its interrogatory responses or both parties are required to so verify. While the rule appears on its face to address both parties to an action, the agency requests comment on this suggestion so that any asymmetry in the rule could be corrected.

3. *Service of documents.* ATA suggests a revision to the rules of practice and the initiation procedures to provide guidance on the appropriate person to accept service of documents on behalf of a respondent. ATA's concern arises from the corporate structure of its members who may not have designated one person or several persons to accept service of documents. ATA suggests that the FAA add a section to the rules of practice or amend § 13.16 to specify that the agency will serve a notice of proposed civil penalty on the person who responded to a letter of investigation or on the president or other designated officer of a company at its principal business address. Subsequent documents could be served on the person who responds to the notice or the attorney of record. ATA states that it makes sense to direct documents in "a manner reasonably calculated to put the company on notice of the formal initiation of a civil penalty." Because of the agency's structure, the FAA understands ATA's concern for guidance on service of documents to large organizations with nationwide operations. ATA suggests that a Departmental rule in economic proceedings (14 CFR 302.8(c)) provides a good model. The FAA requests comment on ATA's suggestion.

4. *Prehearing procedures.* American Airlines suggests revision of the FAA's prehearing procedures in civil penalty cases involving an amount not exceeding $50,000. American believes that the enabling legislation neither contemplated nor justified revision of the prehearing procedures, particularly in light of the differences in those procedures in cases involving civil penalties exceeding $50,000 and those procedures involving civil penalties at or below that amount. American objects specifically to the time limits contained in § 13.16 and proposes changes to the process.

American suggests the following criteria applicable to all civil penalty actions: (1) Specify a time in the rules by which a person must respond to a notice of proposed civil penalty; (2) specify that a person is able to compromise the civil penalty proposed in a notice without a finding of violation; (3) eliminate forfeiture of a right to a hearing even if a respondent does not meet the deadline for responding to a notice; (4) specify that an action will be referred to a U.S. Attorney or a complaint will be filed with the Hearing Docket clerk if an action is not compromised during the prehearing procedures; (5) restrict default judgments or default admissions of liability until after a complaint is filed either in district court or with an administrative law judge. American believes that the FAA and respondents will benefit from "a return to the original prehearing posture" of compromise. The FAA solicits comment on American's suggestion.

Regulatory Evaluation

The FAA has determined that this notice of proposed rulemaking is not a major rule under the criteria of Executive Order 12291; thus, the FAA is not required to prepare a draft Regulatory Impact Analysis under either the Executive Order or the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979).

In nonmajor rulemaking actions, the DOT Regulatory Policies and Procedures require the FAA to prepare a draft regulatory evaluation, analyzing the economic consequences of proposed regulations and quantifying, to the extent practicable, the estimated costs and anticipated benefits and impacts of proposed regulations. This notice invites comment on the agency's rules of practice in civil penalty actions.

Preliminarily, the FAA has not identified any specific economic consequences that would be attributed to the procedural rules. Moreover, the FAA does not anticipate that the proposed rules would result in any significant costs or substantial benefits to respondents or the agency. If there are any costs or benefits associated with the rules of practice, the FAA expects that any economic consequences or impacts would be minimal under the criteria of applicable Executive Orders, statutes, or regulations. If that expectation is accurate, the FAA would not be required to prepare a full regulatory

evaluation of the rules adopted in any final rulemaking document.

Nevertheless, the agency will analyze the economic consequences, if any, of the proposed rules of practice. So that the FAA may prepare, if necessary, a full regulatory evaluation of the rules of practice, commenters are encouraged to submit for the agency's review any data regarding potential costs or expected benefits and impacts of any proposed rule or proposals made by the commenters.

Commenters should discuss any significant economic impact, positive or negative, on small entities, as those terms are defined in the Regulatory Flexibility Act of 1980, that may arise from adopting the rules of practice in this notice. Commenters also should note any expected impact on trade opportunities for U.S. firms operating outside the United States or foreign firms operating within the United States. At this point, the FAA believes that neither small entities nor trade opportunities for businesses would be affected if the proposed rules were adopted. It is the FAA's preliminary opinion that the proposals in this NPRM do not have sufficient Federalism implications to warrant preparation of a Federalism Assessment under the criteria of Executive Order 12612. Commenters should identify and discuss any Federalism issues that may be adversely affected if the proposals are adopted.

Conclusion

The FAA has determined that the NPRM is not a major regulation under the criteria of Executive Order 12291 and, thus, this action does not warrant preparation of a draft Regulatory Impact Analysis. The FAA also expects that the proposals in this NPRM, if adopted, would not have a significant economic impact, positive or negative, on a substantial number of small entities. Because the FAA has been unable to identify any economic consequences associated with the proposals in this NPRM, the agency has not prepared a full draft regulatory evaluation for this rulemaking. The FAA anticipates that there would be little or no economic cost or benefit associated with adoption of these proposals; thus, preparation of a full regulatory evaluation would not be required if the proposed changes are adopted. Because of the interest expressed by the public on the rules of practice, the FAA has determined that this notice of proposed rulemaking is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979).

List of Subjects in 14 CFR Part 13

Enforcement procedures, Investigations, Penalties.

The Proposed Amendments

Accordingly, the FAA amends part 13 of the Federal Aviation Regulations (14 CFR part 13) as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

1. The authority citation for part 3 continues: to read as follows:

Authority: 49 U.S.C. App. 1354 (a) and (c), 1374(d), 1401–1406, 1421–1428, 1471, 1475, 1481, 1482 (a), (b), and (c), and 1484–1489, 1523 (Federal Aviation Act of 1958) (as amended, 49 U.S.C. App. 1471(a)(3) (Federal Aviation Administration Drug Enforcement Assistance Act of 1988); 49 U.S.C. App. 1475 (Airport and Airway Safety and Capacity Expansion Act of 1987); 49 U.S.C. App. 1655(c) (Department of Transportation Act, as revised, 49 U.S.C. 106(g)); 49 U.S.C. 1727 and 1730 (Airport and Airway Development Act of 1970); 49 U.S.C. 1808, 1809, and 1810 (Hazardous Materials Transportation Act); 49 U.S.C. 2218 and 2219 (Airport and Airway Improvement Act of 1982); 49 U.S.C. 2201 (as amended, 49 U.S.C. App. 2218, Airport and Airway Safety and Capacity Expansion Act of 1987)); 18 U.S.C. 6002 and 6004 (Organized Crime Control Act of 1970); 49 CFR § 1.47 (f), (k), and (q) (Regulations of the Office of the Secretary of Transportation).

2. Section 13.16 is revised to read as follows:

§ 13.16 Civil Penalties: Federal Aviation Act of 1958, involving an amount in controversy not exceeding $50,000; Hazardous Materials Transportation Act.

(a) The following penalties apply to persons who violate the Federal Aviation Act of 1958, as amended, and the Hazardous Materials Transportation Act:

(1) Any person who violates any provision of title III, V, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*).

(2) Any person who violates section 404(d) of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 404(d) or section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1374, 1471, *et seq.*).

(3) Any person who operates aircraft for the carriage of persons or property for compensation or hire (other than an airman serving in the capacity of an airman) is subject to a civil penalty of not more than $10,000 for each violation of Title III, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, occurring after December 30, 1987, in accordance with section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*).

(4) Any person who knowingly commits an act in violation of the Hazardous Materials Transportation Act, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than $10,000 for each violation in accordance with section 901 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act (49 U.S.C. 1471 and 1809, *et seq.*). An order assessing civil penalty for a violation under the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder, will be issued only after consideration of—

(i) The nature and circumstances of the violation;

(ii) The extent and gravity of the violation;

(iii) The person's degree of culpability;

(iv) The person's history of prior violations;

(v) The person's ability to pay the civil penalty;

(vi) The effect on the person's ability to continue in business; and

(vii) Such other matters as justice may require.

(b) An order assessing civil penalty may be issued for a violation described in paragraphs (a)(1), (a)(2), (a)(3), and (a)(4) of this section after notice and opportunity for a hearing.

(c) The authority of the Administrator, under sections 901 and 905 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act, to initiate and assess civil penalties for a violation of those Acts, or a rule, regulation, or order issued thereunder, is delegated to the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center. The authority of the Administrator to refer cases to the Attorney General of the United States, or the delegate of the Attorney General, for the collection of assessed civil penalties, is delegated to the Chief Counsel, the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center.

(d) *Notice of proposed civil penalty.* A civil penalty action is initiated by

sending a notice of proposed civil penalty to the person charged with a violation of the Federal Aviation Act of 1958, as amended, the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder. The notice of proposed civil penalty contains a statement of the charges and the amount of the proposed civil penalty.

(e) *Procedures following receipt of notice of proposed civil penalty.* Not later than 30 days after receipt of the notice of proposed civil penalty, the person charged with a violation shall do one of the following:

(1) The person shall submit the amount of the proposed civil penalty in which case an order assessing civil penalty shall be issued in that amount.

(2) The person shall participate in the informal procedures provided in paragraph (f) of this section.

(3) The person shall request a hearing, pursuant to paragraph (i) of this section, in which case a complaint shall be issued and shall be filed with the hearing docket clerk.

(f) *Informal procedures.* Not later than 30 days after receipt of the notice of proposed civil penalty, the person charged with a violation, who wants to participate in informal procedures, shall do one of the following:

(1) The person shall submit any information, including documents and witness statements, in writing, to the agency attorney, demonstrating that a violation of the regulations did not occur or that the penalty or the amount of the penalty is not warranted by the circumstances.

(2) The person shall submit a written request to the agency attorney to reduce the proposed civil penalty and shall submit, in writing, the reasons and documents supporting the reduction of the proposed civil penalty, including records indicating a financial inability to pay or records showing that payment of the proposed civil penalty would prevent the person from continuing in business.

(3) The person shall submit a written request to the agency attorney for an informal conference to discuss the matter with the agency attorney and to submit relevant information or documents to the agency attorney.

(g) *Procedures following interim reply or informal conference.* Not later than 10 days after the person charged with a violation receives an interim reply to any submission made in accordance with paragraph (f)(1) or paragraph (f)(2) or not later than 10 days after an informal conference, the person charged with a violation shall do one of the following:

(1) The person shall submit the amount of the proposed civil penalty in which case an order assessing civil penalty shall be issued in that amount.

(2) The person shall submit additional written information to the agency attorney for consideration.

(3) The person shall request a hearing, pursuant to paragraph (i) of this section, in which case a complaint shall be issued and shall be filed with the hearing docket clerk.

(h) *Complaint.* A complaint shall be issued if the person charged with a violation requests a hearing in accordance with paragraph (e)(3) or (g)(3) of this section.

(i) *Request for a hearing.* Any person who receives a notice of proposed civil penalty may request a hearing, pursuant to paragraph (e)(3) or paragraph (g)(3) of this section, to be conducted in accordance with the procedures in subpart G of this part. A person requesting a hearing shall file a written request for a hearing with the agency attorney. The request for a hearing may be in the form of a letter but must be dated and signed by the person requesting a hearing. The request for a hearing may be typewritten or may be legibly handwritten. A person requesting a hearing shall include a suggested location for the hearing in the request for a hearing.

(j) *Order assessing civil penalty.* An order assessing civil penalty shall be issued if the person charged with a violation—

(1) Submits the amount of the proposed civil penalty in which case the order assessing civil penalty shall reflect receipt of the civil penalty;

(2) Does not respond in a timely manner to the notice of proposed civil penalty;

(3) Does not respond in a timely manner to interim replies from the agency attorney under paragraph (g) of this section; or

(4) Does not comply with any agreement reached between the parties during an informal conference.

(k) *Payment.* A person charged with a violation may pay the amount of the civil penalty proposed in the notice or stated in the order, or an amount agreed upon, by sending a certified check or money order, payable to the Federal Aviation Administration, to the agency attorney.

(l) *Hearing.* If the person charged with a violation requests a hearing pursuant to paragraph (e)(3) or paragraph (g)(3) of this section, a complaint shall be issued and shall be filed with the hearing docket clerk. The procedural rules in subpart G of this part apply to the hearing and any appeal. At the close of the hearing, the administrative law judge shall issue, either orally on the record or in writing, an initial decision, including the reasons for the decision, that contains findings or conclusions on the allegations contained, and the civil penalty sought, in the complaint. The initial decision issued by the administrative law judge shall become an order assessing civil penalty if a party does not appeal the administrative law judge's initial decision to the FAA decisionmaker.

(m) *Appeal.* Either party may appeal the administrative law judge's initial decision to the FAA decisionmaker pursuant to the procedures in subpart G of this part. If a party files a notice of appeal pursuant to § 13.233 of subpart G, the effectiveness of the initial decision is stayed until a final decision and order of the Administrator has been entered on the record. The FAA decisionmaker shall review the record and issue a final decision and order of the Administrator that affirms, modifies, or reverses the initial decision. The FAA decisionmaker shall not assess a civil penalty in an amount greater than the amount stated in the complaint.

(n) *Exhaustion of administrative remedies.* A party may appeal only a final decision and order of the Administrator to the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia pursuant to section 1006 of the Federal Aviation Act of 1958, as amended. An order or an initial decision of an administrative law judge, that has not been appealed to the FAA decisionmaker, does not constitute a final order of the Administrator for the purposes of judicial appellate review under section 1006 of the Federal Aviation Act of 1958, as amended.

(o) If a person subject to an order assessing civil penalty does not pay the assessed civil penalty within 60 days after service of the order assessing civil penalty, the Administrator may refer the order to the United States Attorney General, or the delegate of the Attorney General, to begin proceedings in a United States District Court, pursuant to the authority in section 903 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1473), or section 110 of the Hazardous Materials Transportation Act (49 U.S.C. 1809), to collect the civil penalty.

(p) *Compromise.* The Administrator may compromise any civil penalty, assessed in accordance with sections 901 and 905 of the Federal Aviation Act of 1958, as amended, involving an amount in controversy not exceeding $50,000, or any civil penalty assessed in

accordance with section 901 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act, at any time prior to referring the order assessing civil penalty to the United States Attorney for collection. A civil penalty compromise may include an agreement that the agency makes no finding of a violation, in which case the order assessing civil penalty shall be entitled "order assessing civil penalty/settlement without finding of violation." The order shall expressly provide that the agency makes no finding of a violation and the compromise agreement is not admissible as evidence of a prior violation in any subsequent civil penalty proceeding or certificate action proceeding.

3. Part 13, subpart G, (§ 13.201–§ 13.235) is revised to read as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

Subpart G—Rules of Practice in FAA Civil Penalty Actions

Sec.

13.201 Applicability.
13.202 Definitions.
13.203 Separation of functions.
13.204 Appearances and rights of parties.
13.205 Administrative law judges.
13.206 Intervention.
13.207 Certification of documents.
13.208 Complaint.
13.209 Answer.
13.210 Filing of documents.
13.211 Service of documents.
13.212 Computation of time.
13.213 Extension of time.
13.214 Amendment of pleadings.
13.215 Withdrawal of complaint or request for hearing.
13.216 Waivers.
13.217 Joint procedural or discovery schedule.
13.218 Motions.
13.219 Interlocutory appeals.
13.220 Discovery.
13.221 Notice of hearing.
13.222 Evidence.
13.223 Standard of proof.
13.224 Burden of proof.
13.225 Offer of proof.
13.226 Public disclosure of evidence.
13.227 Expert or opinion witnesses.
13.228 Subpoenas.
13.229 Witness fees.
13.230 Record.
13.231 Argument before the administrative law judge.
13.232 Initial decision.
13.233 Appeal from initial decision.
13.234 Petition to reconsider or modify final decision and order of the FAA decisionmaker on appeal.
13.235 Judicial review of final decision and order.

Subpart G—Rules of Practice in FAA Civil Penalty Actions

§ 13.201 Applicability.

(a) This subpart applies to the following actions:

(1) A civil penalty action in which a complaint has been issued for an amount not exceeding $50,000 for a violation arising under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), or a rule, regulation, or order issued thereunder.

(2) A civil penalty action in which a complaint has been issued for a violation arising under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*) and the Hazardous Materials Transportation Act (49 U.S.C. 1801, *et seq.*), or a rule, regulation, or order issued thereunder.

(b) This subpart applies only to proceedings initiated after September 7, 1988. All other cases, hearings, or other proceedings pending or in progress at the time this subpart is effective are not affected by the rules in this subpart.

(c) Notwithstanding the provisions of paragraph (a) of this section, the United States district courts shall have exclusive jurisdiction of any civil penalty action initiated by the Administrator:

(1) Which involves an amount in controversy in excess of $50,000;

(2) Which is an *in rem* action or in which an *in rem* action based on the same violation has been brought;

(3) Regarding which an aircraft subject to lien has been seized by the United States; and

(4) In which a suit for injunctive relief based on the violation giving rise to the civil penalty has also been brought.

§ 13.202 Definitions.

Administrative law judge means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105.

Agency attorney means the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Assistant Chief Counsel for a region or center, or an attorney on the staff of the Assistant Chief Counsel for Regulations and Enforcement or the Assistant Chief Counsel for a region or center who prosecutes a civil penalty action. An agency attorney shall not include the Chief Counsel, the Assistant Chief Counsel for Litigation, or any attorney on the staff of the Assistant Chief Counsel for Litigation who advises the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker or who is supervised in that action by a person who provides such advice in a civil penalty action.

Attorney means a person licensed by a state, the District of Columbia, or a territory of the United States to practice law or appear before the courts of that state or territory.

Complaint means a document issued by an agency attorney alleging a violation of the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder, which has been filed with the hearing docket after a hearing has been requested pursuant to § 13.16(e)(3) or § 13.16(g)(3) of this part.

FAA decisionmaker means the Administrator of the Federal Aviation Administration, acting in the capacity of the decisionmaker on appeal, or any person to whom the Administrator has delegated the Administrator's decisionmaking authority in a civil penalty action. As used in this subpart, the FAA decisionmaker is the official authorized to issue a final decision and order of the Administrator in a civil penalty action.

Mail includes U.S. certified mail, U.S. registered mail, or use of an overnight express courier service.

Order assessing civil penalty means an order issued by an agency attorney, or an initial decision issued by an administrative law judge that is not appealed to the FAA decisionmaker, that directs a person to pay a civil penalty.

Party means the agency attorney, or the respondent named in a complaint.

Personal delivery includes hand-delivery or use of a contract or express messenger service. "Personal delivery" does not include the use of Government interoffice mail service.

Pleading means a complaint, an answer, and any amendment of these documents permitted under this subpart.

Properly addressed means a document that shows an address contained in FAA records, a residential, business, or other address submitted by a person on any document provided by this subpart, or any other address shown by other reasonable and available means.

Respondent means a person to whom a civil penalty is directed and who has received a complaint.

§ 13.203 Separation of functions.

(a) Civil penalty proceedings, including hearings, shall be prosecuted by an agency attorney.

(b) An FAA employee engaged in the performance of investigative or

prosecutorial functions in a civil penalty action shall not, in that case or a factually-related case, participate or give advice in a decision by the administrative law judge or by the FAA decisionmaker on appeal, except as counsel or a witness in the public proceedings.

(c) The Chief Counsel, the Assistant Chief Counsel for Litigation, or attorneys on the staff of the Assistant Chief Counsel for Litigation will advise the FAA decisionmaker regarding an initial decision or any appeal of that civil penalty action to the FAA decisionmaker.

§ 13.204 Appearances and rights of parties.

(a) Any party may appear and be heard in person.

(b) Any party may be accompanied, represented, or advised by an attorney or representative designated by the party and may be examined by that attorney or representative in any proceeding governed by this subpart. An attorney or representative who represents a party may file a notice of appearance in the action, in the manner provided in § 13.210 of this subpart, and shall serve a copy of the notice of appearance on each party, in the manner provided in § 13.211 of this subpart, before participating in any proceeding governed by this subpart. The attorney or representative shall include the name, address, and telephone number of the attorney or representative in the notice of appearance.

(c) Any person may request a copy of a document upon payment of reasonable costs. A person may keep an original document, data, or evidence, with the consent of the administrative law judge, by substituting a legible copy of the document for the record.

§ 13.205 Administrative law judges.

(a) *Powers of an administrative law judge.* In accordance with the rules of this subpart, an administrative law judge may:

(1) Give notice of, and hold, prehearing conferences and hearings;

(2) Administer oaths and affirmations;

(3) Issue subpoenas authorized by law and issue notices of deposition requested by the parties;

(4) Rule on offers of proof;

(5) Receive relevant and material evidence;

(6) Regulate the course of the hearing in accordance with the rules of this subpart;

(7) Hold conferences to settle or to simplify the issues by consent of the parties;

(8) Dispose of procedural motions and requests; and

(9) Make findings of fact and conclusions of law, and issue an initial decision.

(b) *Limitations on the power of the administrative law judge.* The administrative law judge shall not issue an order of contempt, award costs to any party, or impose any sanction not specified in this subpart. If the administrative law judge imposes any sanction not specified in this subpart, a party may file an interlocutory appeal of right with the FAA decisionmaker pursuant to § 13.219(c)(4) of this subpart. This section does not preclude an administrative law judge from issuing an order that bars a person from a specific proceeding based on a finding of obstreperous or disruptive behavior in that specific proceeding.

(c) *Disqualification.* The administrative law judge may disqualify himself or herself at any time. A party may file a motion, pursuant to § 13.218(f)(6), requesting that an administrative law judge be disqualified from the proceedings.

§ 13.206 Intervention.

(a) Any person who has a statutory right to participate in the proceedings shall be allowed to intervene in the proceedings by the administrative law judge.

(b) In all other cases, the administrative law judge shall not allow any person to intervene in any proceeding governed by this subpart.

§ 13.207 Certification of documents.

(a) *Signature required.* The attorney of record, the party, or the party's representative shall sign each document tendered for filing with the hearing docket clerk, the administrative law judge, the FAA decisionmaker on appeal, or served on each party.

(b) *Effect of signing a document.* By signing a document, the attorney of record, the party, or the party's representative certifies that the attorney or party has read the document and, based on reasonable inquiry and to the best of the attorney's or party's knowledge, information, and belief, the document is:

(1) Consistent with these rules;

(2) Warranted by existing law or that a good faith argument exists for extension, modification, or reversal of existing law; and

(3) Not unreasonable or unduly burdensome or expensive, not made to harass any person, not made to cause unnecessary delay, not made to cause needless increase in the cost of the proceedings, or for any other improper purpose.

(c) *Sanctions.* If the attorney of record, the party, or the party's representative signs a document in violation of this section, the administrative law judge or the FAA decisionmaker shall:

(1) Strike the pleading signed in violation of this section;

(2) Strike the request for discovery or the discovery response signed in violation of this section and preclude further discovery by the party;

(3) Deny the motion or request signed in violation of this section;

(4) Exclude the document signed in violation of this section from the record;

(5) Dismiss the interlocutory appeal and preclude further appeal on that issue by the party who filed the appeal until an initial decision has been entered on the record; or

(6) Dismiss the appeal of the administrative law judge's initial decision to the FAA decisionmaker.

§ 13.208 Complaint.

(a) The agency attorney shall serve the original complaint on the person requesting the hearing.

(b) The agency attorney shall file the complaint, attaching a copy of the request for a hearing, and shall suggest a location for the hearing, with the hearing docket clerk not later than 20 days after receipt of a person's request for hearing.

(c) If the agency attorney and the person requesting the hearing do not agree on the location for the hearing, the hearing docket clerk shall assign a hearing location near the place where the incident occurred.

§ 13.209 Answer.

(a) *Writing required.* A person who receives a complaint shall file a written answer to the complaint, or a motion pursuant to § 13.218(f)(1–4) of this subpart, not later than 30 days after service of the complaint. The answer may be in the form of a letter but must be dated and signed by the person responding to the complaint. An answer may be typewritten or may be legibly handwritten.

(b) *Filing and address.* A person filing an answer shall personally deliver or mail the answer for filing with the hearing docket clerk to the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue SW., Room 924A, Washington, DC 20591, Attention: Hearing Docket Clerk.

(c) *Contents.* A person filing an answer shall include a brief statement of the relief requested by the person in the answer. The person shall include

specifically any affirmative defense in the answer that the person intends to assert at the hearing.

(d) *Specific denial of allegations required.* A person filing an answer shall admit, deny, or state that the person is without sufficient knowledge or information to admit or deny each allegation in each numbered paragraph of the complaint. A general denial of the complaint is deemed a failure to file an answer. Any statement or allegation contained in the complaint that is not specifically denied in the answer is deemed an admission of the truth of that allegation.

(e) *Service.* A person filing an answer shall comply with the service requirements of § 13.211 of this subpart.

(f) *Failure to file answer.* A person's failure to file an answer without good cause is deemed an admission of the truth of each allegation contained in the complaint and an order assessing civil penalty shall be issued.

§ 13.210 Filing of documents.

(a) *Address and method of filing.* A person tendering a document for filing shall personally deliver or mail the signed original and one copy of each document to the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue SW., Room 924A, Washington, DC 20591, Attention: Hearing Docket Clerk. After an administrative law judge has been assigned to the proceedings, a person shall personally deliver or mail the signed original of each document to the hearing docket clerk and shall serve a copy of each document on each party and the administrative law judge.

(b) *Date of filing.* A document shall be considered to be filed on the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.

(c) *Form.* Each document shall be typewritten or legibly handwritten.

(d) *Contents.* Unless otherwise specified in this subpart, each document must contain a short, plain statement of the facts on which the person's case rests and a brief statement of the action requested in the document.

§ 13.211 Service of documents.

(a) *General.* A person shall serve a copy of any document filed with the Hearing Docket on the administrative law judge and on each party at the time of filing.

(b) *Type of service.* A person may serve documents by personal delivery or by mail.

(c) *Certificate of service.* A person may attach a certificate of service to a document tendered for filing with the hearing docket clerk. A certificate of service shall consist of a statement, dated and signed by the person filing the document, that the document was personally delivered or mailed to each party on a specific date.

(d) *Date of service.* The date of service shall be the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.

(e) *Additional time after service by mail.* Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period.

(f) *Service by the administrative law judge.* The administrative law judge shall serve a copy of each document including, but not limited to, notices of prehearing conferences and hearings, rulings on motions, decisions, and orders, upon each party to the proceedings by personal delivery or by mail.

(g) *Valid service.* A document that was properly addressed, was sent in accordance with this subpart, and that was returned, that was not claimed, or that was refused, is deemed to have been served in accordance with this subpart. The service shall be considered valid as of the date and the time that the document was deposited with a contract or express messenger, the document was mailed, or personal delivery of the document was refused.

(h) *Presumption of service.* There shall be a presumption of service where a party or a person, who customarily receives mail, or receives it in the ordinary course of business, at either the person's residence or the person's principal place of business, acknowledges receipt of the document.

§ 13.212 Computation of time.

(a) This section applies to any period of time prescribed or allowed by this subpart, by notice or order of the administrative law judge, or by any applicable statute.

(b) The date of an act, event, or default, after which a designated time period begins to run, is not included in a computation of time under this subpart.

(c) The last day of a time period is included in a computation of time unless it is a Saturday, Sunday, or a legal holiday. If the last day of the time period is a Saturday, Sunday, or legal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

§ 13.213 Extension of time.

(a) *Oral requests.* The parties may reasonably agree to extend the time for filing a document under this subpart. If the parties agree, the administrative law judge shall grant one extension of time to each party. The party seeking the extension of time shall submit a draft order to the administrative law judge to be signed by the administrative law judge and filed with the hearing docket clerk. The administrative law judge may grant additional oral requests for an extension of time where the parties agree to the extension.

(b) *Written motion.* A party shall file a written motion for an extension of time with the administrative law judge not later than 7 days before the document is due unless good cause for the late filing is shown. A party filing a written motion for an extension of time shall serve a copy of the motion on each party. The administrative law judge may grant the extension of time if good cause for the extension is shown.

(c) *Failure to rule.* If the administrative law judge fails to rule on a written motion for an extension of time by the date the document was due, the motion for an extension of time is deemed granted for no more than 20 days after the original date the document was to be filed.

§ 13.214 Amendment of pleadings.

(a) *Filing and service.* A party shall file the amendment with the administrative law judge and shall serve a copy of the amendment on all parties to the proceeding.

(b) *Time.* A party shall file an amendment to a complaint or an answer within the following:

(1) Not later than 15 days before the scheduled date of a hearing, a party may amend a complaint or an answer without the consent of the administrative law judge.

(2) Less than 15 days before the scheduled date of a hearing, the administrative law judge may allow amendment of a complaint or an answer only for good cause shown in a motion to amend.

(c) *Responses.* The administrative law judge shall allow a reasonable time, but not more than 20 days from the date of filing, for other parties to respond if an amendment to a complaint, answer, or

other pleading has been filed with the administrative law judge.

§ 13.215 Withdrawal of complaint or request for hearing.

At any time before or during a hearing, the agency attorney may withdraw a complaint or a party may withdraw a request for a hearing without the consent of the administrative law judge. If the agency attorney withdraws the complaint or a party withdraws the request for a hearing and the answer, the administrative law judge shall dismiss the proceedings in this subpart with prejudice.

§ 13.216 Waivers.

Waivers of any rights provided by statute or regulation shall be in writing or by stipulation made at a hearing and entered into the record. The parties shall set forth the precise terms of the waiver and any conditions.

§ 13.217 Joint procedural or discovery schedule.

(a) *General.* The parties may agree to submit a schedule for filing all prehearing motions, a schedule for conducting discovery in the proceedings, or a schedule that will govern all prehearing motions and discovery in the proceedings.

(b) *Form and content of schedule.* If the parties agree to a joint procedural or discovery schedule, one of the parties shall file the joint schedule with the administrative law judge, setting forth the dates to which the parties have agreed, and shall serve a copy of the joint schedule on each party.

(1) The joint schedule may include, but need not be limited to, requests for discovery, any objections to discovery requests, responses to discovery requests to which there are no objections, submission of prehearing motions, responses to prehearing motions, exchange of exhibits to be introduced at the hearing, and a list of witnesses that may be called at the hearing.

(2) Each party shall sign the original joint schedule to be filed with the administrative law judge.

(c) *Time.* The parties may agree to submit all prehearing motions and responses and may agree to close discovery in the proceedings under the joint schedule within a reasonable time before the date of the hearing, but not later than 15 days before the hearing.

(d) *Order establishing joint schedule.* The administrative law judge shall approve the joint schedule filed by the parties. One party shall submit a draft order establishing a joint schedule to the administrative law judge to be signed by the administrative law judge and filed with the hearing docket clerk.

(e) *Disputes.* The administrative law judge shall resolve disputes regarding discovery or disputes regarding compliance with the joint schedule as soon as possible so that the parties may continue to comply with the joint schedule.

(f) *Sanctions for failure to comply with joint schedule.* If a party fails to comply with the administrative law judge's order establishing a joint schedule, the administrative law judge may direct that party to comply with a motion to discovery request or, limited to the extent of the party's failure to comply with a motion or discovery request, the administrative law judge may:

(1) Strike that portion of a party's pleadings;

(2) Preclude prehearing or discovery motions by that party;

(3) Preclude admission of that portion of a party's evidence at the hearing, or

(4) Preclude that portion of the testimony of that party's witnesses at the hearing.

§ 13.218 Motions.

(a) *General.* A party applying for an order or ruling not specifically provided in this subpart shall do so by motion. A party shall comply with the requirements of this section when filing a motion with the administrative law judge. A party shall serve a copy of each motion on each party.

(b) *Form and contents.* A party shall state the relief sought by the motion and the particular grounds supporting that relief. If a party has evidence in support of a motion, the party shall attach any supporting evidence, including affidavits, to the motion.

(c) *Filing of motions.* A motion made prior to the hearing must be in writing. Unless otherwise agreed by the parties or for good cause shown, a party shall file any prehearing motion, and shall serve a copy on each party, not later than 30 days before the hearing. Motions introduced during a hearing may be made orally on the record unless the administrative law judge directs otherwise.

(d) *Answers to motions.* Any party may file an answer, with affidavits or other evidence in support of the answer, not later than 10 days after service of a written motion on that party. When a motion is made during a hearing, the answer may be made at the hearing on the record, orally or in writing, within a reasonable time determined by the administrative law judge.

(e) *Rulings on motions.* The administrative law judge shall rule on all motions as follows:

(1) *Discovery motions.* The administrative law judge shall resolve all pending discovery motions not later than 10 days before the hearing.

(2) *Prehearing motions.* The administrative law judge shall resolve all pending prehearing motions not later than 7 days before the hearing. If the administrative law judge issues a ruling or order orally, the administrative law judge shall serve a written copy of the ruling or order, within 3 days, on each party. In all other cases, the administrative law judge shall issue rulings and orders in writing and shall serve a copy of the ruling or order on each party.

(3) *Motions made during the hearing.* The administrative law judge may issue rulings and orders on motions made during the hearing orally. Oral rulings or orders on motions must be made on the record.

(f) *Specific motions.* A party may file the following motions with the administrative law judge:

(1) *Motion to dismiss for insufficiency.* A party may file a motion to dismiss the complaint for insufficiency instead of an answer. If the administrative law judge denies the motion to dismiss the complaint for insufficiency, the party who received the complaint shall file an answer not later than 10 days after service of the administrative law judge's denial of the motion. A motion to dismiss the complaint for insufficiency must show that the complaint fails to state a violation of the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or a violation of the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder.

(2) *Motion to dismiss.* A party may file a motion to dismiss a complaint instead of an answer, specifying the grounds for dismissal.

(i) If a motion to dismiss is not granted, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the administrative law judge's ruling or order on the motion to dismiss.

(ii) If the administrative law judge grants a motion to dismiss and terminates the proceedings without a hearing, the agency attorney may file an appeal pursuant to § 13.233 of this subpart. If the administrative law judge grants a motion to dismiss in part, the agency attorney may appeal the

administrative law judge's decision to dismiss part of the complaint under the provisions of § 13.219(c) of this subpart. If required by the decision on appeal, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the decision on appeal.

(3) *Motion for more definite statement.* A party may file a motion for more definite statement of any pleading which requires a response under this subpart. A party shall set forth, in detail, the indefinite or uncertain allegations contained in a complaint or response to any pleading and shall submit the details that the party believes would make the allegation or response definite and certain.

(i) *Complaint.* A party may file a motion requesting a more definite statement of the allegations contained in the complaint instead of an answer. If the administrative law judge grants the motion, and the agency attorney does not supply a more definite statement not later than 15 days after service of the order granting the motion, the administrative law judge shall strike the allegations in the complaint to which the motion is directed. If the administrative law judge denies the motion, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the order of denial.

(ii) *Answer.* A party may file a motion requesting a more definite statement if an answer fails to clearly respond to the allegations in the complaint. If the administrative law judge grants the motion, the respondent shall supply a more definite statement not later than 15 days after service of the ruling on the motion. If the respondent fails to supply a more definite statement, the administrative law judge shall strike those statements in the answer to which the motion is directed. A party's failure to supply a more definite statement is deemed a failure to answer and the unanswered allegations in the complaint are deemed admitted.

(4) *Motion to strike.* Any party may make a motion to strike any insufficient allegation or defense, or any redundant, immaterial, or irrelevant matter in a pleading. A party shall file a motion to strike with the administrative law judge and shall serve a copy on each party before a response is required under this subpart or, if a response is not required, not later than 10 days after service of the pleading.

(5) *Motion for decision.* A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact disputed by the parties.

(6) *Motion for disqualification.* A party may file a motion for disqualification with the administrative law judge and shall serve a copy on each party. A party may file the motion at any time after the administrative law judge has been assigned to the proceedings but shall make a motion before the administrative law judge files an initial decision in the proceedings.

(i) *Motion and supporting affidavit.* A party shall state the grounds for disqualification, including, but not limited to, personal bias, pecuniary interest, or other factors showing disqualification, in the motion for disqualification. A party shall submit an affidavit with the motion for disqualification that sets forth, in detail, the matters alleged to constitute grounds for disqualification.

(ii) *Answer.* A party shall respond to the motion for disqualification not later than 5 days after service of the motion for disqualification.

(iii) *Decision on motion for disqualification.* The administrative law judge shall render a decision on the motion for disqualification not later than 15 days after the motion has been filed. If the administrative law judge finds that the motion for disqualification and supporting affidavit show a basis for disqualification, the administrative law judge shall withdraw from the proceedings immediately. If the administrative law judge finds that disqualification is not warranted, the administrative law judge shall deny the motion and state the grounds for the denial on the record. If the administrative law judge fails to rule on a party's motion for disqualification within 15 days after the motion has been filed, the motion is deemed granted.

(iv) *Appeal.* A party may appeal the administrative law judge's denial of the motion for disqualification in accordance with § 13.219 of this subpart.

§ 13.219 Interlocutory appeals.

(a) *General.* Unless otherwise provided in this subpart, a party may not appeal a ruling or decision of the administrative law judge to the FAA decisionmaker until the initial decision has been entered on the record. A decision or order of the FAA decisionmaker on the interlocutory appeal does not constitute a final order of the Administrator for the purposes of judicial appellate review under section 1006 of the Federal Aviation Act of 1958, as amended.

(b) *Interlocutory appeal for cause.* If a party files a written request for an interlocutory appeal for cause with the administrative law judge, or orally requests an interlocutory appeal for cause, the proceedings are stayed until the administrative law judge issues a decision on the request. If the administrative law judge grants the request, the proceedings are stayed until the FAA decisionmaker issues a decision on the interlocutory appeal. The administrative law judge shall grant an interlocutory appeal for cause if a party shows that delay of the appeal would be detrimental to the public interest or would result in undue prejudice to any party.

(c) *Interlocutory appeals of right.* If a party notifies the administrative law judge of an interlocutory appeal of right, the proceedings are stayed until the FAA decisionmaker issues a decision on the interlocutory appeal. A party may file an interlocutory appeal with the FAA decisionmaker, without the consent of the administrative law judge, before an initial decision has been entered in the case of:

(1) A ruling or order by the administrative law judge barring a person from the proceedings;

(2) Failure of the administrative law judge to dismiss the proceedings in accordance with § 13.215 of this subpart;

(3) A ruling or order by the administrative law judge in violation of § 13.205(b) of this subpart; and

(4) A ruling by the administrative law judge granting, in part, a respondent's motion to dismiss a complaint pursuant to § 13.218(f)(2)(ii).

(d) *Procedure.* A party shall file a notice of interlocutory appeal, with supporting documents, with the FAA decisionmaker and the hearing docket clerk, and shall serve a copy of the notice and supporting documents on each party and the administrative law judge, not later than 3 days after the administrative law judge's decision forming the basis of the appeal. A party shall file a reply brief, if any, with the FAA decisionmaker and serve a copy of the reply brief on each party, not later than 10 days after service of the appeal brief. If the FAA decisionmaker does not

issue a decision on the interlocutory appeal or does not seek additional information within 10 days of the filing of the appeal, the stay of the proceeding is dissolved. The FAA decisionmaker shall render a decision on the interlocutory appeal, on the record and as a part of the decision in the proceedings, within a reasonable time after receipt of the interlocutory appeal.

(e) The FAA decisionmaker may reject frivolous, repetitive, or dilatory appeals, and may issue an order precluding one or more parties from making further interlocutory appeals in a proceeding in which there have been frivolous, repetitive, or dilatory interlocutory appeals.

§ 13.220 Discovery.

(a) *Initiation of discovery.* Any party may initiate discovery described in this section, without the consent or approval of the administrative law judge, at any time after a complaint has been filed in the proceedings.

(b) *Methods of discovery.* The following methods of discovery are permitted under this section: depositions on oral examination or written questions of any person; written interrogatories directed to a party; requests for production of documents or tangible items to any person; and requests for admission by a party. A party is not required to file written interrogatories and responses, requests for production of documents or tangible items and responses, and requests for admission and response with the administrative law judge or the hearing docket clerk. In the event of a discovery dispute, a party shall attach a copy of these documents in support of a motion made under this section.

(c) *Service on the agency.* A party shall serve each discovery request directed to the agency or any agency employee on the agency attorney of record.

(d) *Time for response to discovery requests.* Unless otherwise directed by this subpart or agreed by the parties, a party shall respond to a request for discovery, including filing objections to a request for discovery, not later than 30 days of service of the request.

(e) *Scope of discovery.* Subject to the limits on discovery set forth in paragraph (f) of this section, a party may discover any matter that is not privileged and that is relevant to the subject matter of the proceeding. A party may discover information that relates to the claim or defense of any party including the existence, description, nature, custody, condition, and location of any document or other tangible item and the identity and location of any person having knowledge of discoverable matter. A party may discover facts known, or opinions held, by an expert who any other party expects to call to testify at the hearing. A party has no ground to object to a discovery request on the basis that the information sought would not be admissible at the hearing if the information sought during discovery is reasonably calculated to lead to the discovery of admissible evidence.

(f) *Limiting discovery.* The administrative law judge shall limit the frequency and extent of discovery permitted by this section if a party shows that:

(1) The information requested is cumulative or repetitious;

(2) The information requested can be obtained from another less burdensome and more convenient source;

(3) The party requesting the information has had ample opportunity to obtain the information through other discovery methods permitted under this section; or

(4) The method or scope of discovery requested by the party is unduly burdensome or expensive.

(g) *Confidential orders.* A party or person who has received a discovery request for information that is related to a trade secret, confidential or sensitive material, competitive or commercial information, proprietary data, or information on research and development, may file a motion for a confidential order with the administrative law judge and shall serve a copy of the motion for a confidential order on each party.

(1) The party or person making the motion must show that the confidential order is necessary to protect the information from disclosure to the public.

(2) If the administrative law judge determines that the requested material is not necessary to decide the case, the administrative law judge shall preclude any inquiry into the matter by any party.

(3) If the administrative law judge determines that the requested material may be disclosed during discovery, the administrative law judge may order that the material may be discovered and disclosed under limited conditions or may be used only under certain terms and conditions.

(4) If the administrative law judge determines that the requested material is necessary to decide the case and that a confidential order is warranted, the administrative law judge shall provide:

(i) An opportunity for review of the document by the parties off the record;

(ii) Procedures for excluding the information from the record; and

(iii) Order that the parties shall not disclose the information in any manner and the parties shall not use the information in any other proceeding.

(h) *Protective orders.* A party or a person who has received a request for discovery may file a motion for protective order with the administrative law judge and shall serve a copy of the motion for protective order on each party. The party or person making the motion must show that the protective order is necessary to protect the party or the person from annoyance, embarrassment, oppression, or undue burden or expense. As part of the protective order, the administrative law judge may:

(1) Deny the discovery request;

(2) Order that discovery be conducted only on specified terms and conditions, including a designation of the time or place for discovery or a determination of the method of discovery; or

(3) Limit the scope of discovery or preclude any inquiry into certain matters during discovery.

(i) *Duty to supplement or amend responses.* A party who has responded to a discovery request has a duty to supplement or amend the response, as soon as the information is known, as follows:

(1) A party shall supplement or amend any response to a question requesting the identity and location of any person having knowledge of discoverable matters.

(2) A party shall supplement or amend any response to a question requesting the identity of each person who will be called to testify at the hearing as an expert witness and the subject matter and substance of that witness' testimony.

(3) A party shall supplement or amend any response that was incorrect when made or any response that was correct when made but is no longer correct, accurate, or complete.

(j) *Depositions.* The following rules apply to depositions taken pursuant to this section:

(1) *Form.* A deposition shall be taken on the record and reduced to writing. The person being deposed shall sign the deposition unless the parties agree to waive the requirement of a signature.

(2) *Administration of oaths.* Within the United States, or a territory or possession subject to the jurisdiction of the United States, a party shall take a deposition before a person authorized to administer oaths by the laws of the United States or authorized by the law of the place where the examination is held. In foreign countries, a party shall take a deposition in any manner

allowed by the *Federal Rules of Civil Procedure.*

(3) *Notice of deposition.* A party shall serve a notice of deposition, stating the time and place of the deposition and the name and address of each person to be examined, on the person to be deposed, on the administrative law judge, on the hearing docket clerk, and on each party not later than 7 days before the deposition. A party may serve a notice of deposition less than 7 days before the deposition only with consent of the administrative law judge. If a subpoena *duces tecum* is to be served on the person to be examined, the party shall attach a copy of the subpoena *duces tecum* that describes the materials to be produced at the deposition to the notice of deposition.

(4) *Use of depositions.* A party may use any part or all of a deposition at a hearing authorized under this subpart only upon a showing of good cause. The deposition may be used against any party who was present or represented at the deposition or who had reasonable notice of the deposition.

(k) *Interrogatories.* A party shall not serve more than 30 interrogatories to each other party. Each subpart of an interrogatory shall be counted as a separate interrogatory.

(1) A party shall answer each interrogatory separately and completely in writing and under oath. A party's attorney may sign the response to the interrogatories if the attorney has verification of authority to sign from the party. If a party objects to an interrogatory, the party shall state the objection and the reasons for the objection.

(2) A party shall file a motion for leave to serve additional interrogatories on a party with the administrative law judge before serving additional interrogatories on a party. The administrative law judge shall grant the motion only if the party shows good cause for the party's failure to inquire about the information previously and that the information cannot reasonably be obtained using less burdensome discovery methods or be obtained from other sources.

(l) *Requests for admission.* A party may serve a written request for admission of the truth of any matter within the scope of discovery under this section or the authenticity of any document described in the request. A party shall set forth each request for admission separately. A party shall serve copies of documents referenced in the request for admission unless the documents have been provided or are reasonably available for inspection and copying.

(1) *Time.* A party's failure to respond to a request for admission, in writing and signed by the attorney or the party, not later than 30 days after service of the request, is deemed an admission of the truth of the statement or statements contained in the request for admission. The administrative law judge may determine that a failure to respond to a request for admission is not deemed an admission of the truth if a party shows that the failure was due to circumstances beyond the control of the party or the party's attorney.

(2) *Response.* A party may object to a request for admission and shall state the reasons for objection. A party may specifically deny the truth of the matter or describe the reasons why the party is unable to truthfully deny or admit the matter. If a party is unable to deny or admit the truth of the matter, the party shall show that the party has made reasonable inquiry into the matter or that the information known to, or readily obtainable by, the party is insufficient to enable the party to admit or deny the matter. A party may admit or deny any part of the request for admission. If the administrative law judge determines that a response does not comply with the requirements of this rule or that the response is insufficient, the matter is deemed admitted.

(3) *Effect of admission.* Any matter admitted or deemed admitted under this section is conclusively established for the purpose of the hearing and appeal.

(m) *Motion to compel discovery.* A party may make a motion to compel discovery if a person refuses to answer a question during a deposition, a party fails or refuses to answer an interrogatory, if a person gives an evasive or incomplete answer during a deposition or when responding to an interrogatory, or a party fails or refuses to produce documents or tangible items. During a deposition, the proponent of a question may complete the deposition or may adjourn the examination before making a motion to compel if a person refuses to answer.

(n) *Failure to comply with a discovery order or order to compel.* If a party fails to comply with a discovery order or an order to compel, the administrative law judge, limited to the extent of the party's failure to comply with the discovery order or motion to compel, may:

(1) Strike that portion of a party's pleadings;

(2) Preclude prehearing or discovery motions by that party;

(3) Preclude admission of that portion of a party's evidence at the hearing; or

(4) Preclude that portion of the testimony of that party's witnesses at the hearing.

§ 13.221 Notice of hearing.

(a) *Notice.* The administrative law judge shall give each party at least 60 days notice of the date and time of the hearing.

(b) *Date and time of the hearing.* The administrative law judge to whom the proceedings have been assigned shall set a reasonable date and time for the hearing. The administrative law judge shall consider the need for discovery and any joint procedural or discovery schedule submitted by the parties when determining the hearing date.

(c) *Location of the hearing.* After assignment of an administrative law judge to the proceedings, a party may file a motion to change the location of the hearing or the administrative law judge on his own motion may change the location of the hearing. The administrative law judge shall give due regard to where the majority of the witnesses reside or work, the convenience of the parties, and whether the location is served by a scheduled air carrier.

(d) *Earlier hearing.* With the consent of the administrative law judge, the parties may agree to hold the hearing on an earlier date than the date specified in the notice of hearing.

§ 13.222 Evidence.

(a) *General.* A party is entitled to present the party's case or defense by oral, documentary, or demonstrative evidence, to submit rebuttal evidence, and to conduct any cross-examination that may be required for a full and true disclosure of the facts.

(b) *Admissibility.* A party may introduce any oral, documentary, or demonstrative evidence in support of the party's case or defense. The administrative law judge shall admit any oral, documentary, or demonstrative evidence introduced by a party but shall exclude irrelevant, immaterial, or unduly repetitious evidence.

(c) *Hearsay evidence.* Hearsay evidence is admissible in proceedings governed by this subpart. The fact that evidence submitted by a party is hearsay goes only to the weight of the evidence and does not affect its admissibility.

§ 13.223 Standard of proof.

The administrative law judge shall issue an initial decision or shall rule in a party's favor only if the decision or ruling is supported by, and in accordance with, the reliable, probative, and substantial evidence contained in the record. In order to prevail, the party with the burden of proof shall prove the party's case or defense by a

preponderance of reliable, probative, and substantial evidence.

§ 13.224 Burden of proof.

(a) Except in the case of an affirmative defense, the burden of proof is on the agency.

(b) Except as otherwise provided by statute or rule, the proponent of a motion, request, or order has the burden of proof.

(c) A party who has asserted an affirmative defense has the burden of proving the affirmative defense.

§ 13.225 Offer of proof.

A party whose evidence has been excluded by a ruling of the administrative law judge may offer the evidence for the record on appeal.

§ 13.226 Public disclosure of evidence.

(a) The administrative law judge may order that any information contained in the record be withheld from public disclosure. Any person may object to disclosure of information in the record by filing a written motion to withhold specific information with the administrative law judge and serving a copy of the motion on each party. The party shall state the specific grounds for nondisclosure in the motion.

(b) The administrative law judge shall grant the motion to withhold information in the record if, based on the motion and any response to the motion, the administrative law judge determines that disclosure would be detrimental to aviation safety, disclosure would not be in the public interest, or that the information is not otherwise required to be made available to the public.

§ 13.227 Expert or opinion witnesses.

An employee of the agency may not be called as an expert or opinion witness, for any party other than the agency, in any proceeding governed by this subpart. An employee of a respondent may not be called by an agency attorney as an expert or opinion witness for the agency in any proceeding governed by this subpart to which the respondent is a party.

§ 13.228 Subpoenas.

(a) *Request for subpoena.* A party may obtain a subpoena to compel the attendance of a witness at a deposition or hearing or to require the production of documents or tangible items from the hearing docket clerk. The hearing docket clerk shall deliver the subpoena, signed by the hearing docket clerk or an administrative law judge but otherwise in blank, to the party. The party shall complete the subpoena, stating the title of the action and the date and time for the witness' attendance or production of documents or items. The party who obtained the subpoena shall serve the subpoena on the witness.

(b) *Motion to quash or modify the subpoena.* Any person upon whom a subpoena has been served may file a motion to quash or modify the subpoena with the administrative law judge at or before the time specified in the subpoena for compliance. The applicant shall describe, in detail, the basis for the application to quash or modify the subpoena including, but not limited to, a statement that the testimony or the documents or tangible evidence is not relevant to the proceeding, that the subpoena is not reasonably tailored to the scope of the proceeding, or that the subpoena is unreasonable and oppressive. A motion to quash or modify the subpoena will stay the effect of the subpoena pending a decision by the administrative law judge on the motion.

(c) *Enforcement of subpoena.* Upon a showing that a person has failed or refused to comply with a subpoena, a party may apply to the local Federal district court to seek judicial enforcement of the subpoena in accordance with section 1004 of the Federal Aviation Act of 1958, as amended.

§ 13.229 Witness fees.

(a) *General.* Unless otherwise authorized by the administrative law judge, the party who applies for a subpoena to compel the attendance of a witness at a deposition or hearing, or the party at whose request a witness appears at a deposition or hearing, shall pay the witness fees described in this section.

(b) *Amount.* Except for an FAA employee who appears at the direction of the agency, a witness who appears at a disposition or hearing is entitled to the same fees and mileage expenses as are paid to a witness in a court of the United States in comparable circumstances.

§ 13.230 Record.

(a) *Exclusive record.* The transcript of all testimony in the hearing, all exhibits received into evidence, and all motions, applications, requests, and rulings shall constitute the exclusive record for decision of the proceedings and the basis for the issuance of any orders in the proceeding. Any proceedings regarding the disqualification of an administrative law judge shall be included in the record.

(b) *Examination and copying of record.* Any person may examine the record at the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue, SW., Room 924A, Washington, DC 20591. Any person may have a copy of the record after payment of reasonable costs to copy the record.

§ 13.231 Argument before the administrative law judge.

(a) *Arguments during the hearing.* During the hearing, the administrative law judge shall give the parties a reasonable opportunity to present arguments on the record supporting or opposing motions, objections, and rulings if the parties request an opportunity for argument. The administrative law judge may request written arguments during the hearing if the administrative law judge finds that submission of written arguments would be reasonable.

(b) *Final oral argument.* At the conclusion of the hearing and before the administrative law judge issues an initial decision in the proceedings, the parties are entitled to submit oral proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. At the conclusion of the hearing, a party may waive final oral argument.

(c) *Posthearing briefs.* The administrative law judge may request written posthearing briefs before the administrative law judge issues an initial decision in the proceedings if the administrative law judge finds that submission of written arguments would be reasonable. If a party files a written posthearing brief, the party shall include proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. The administrative law judge shall give the parties a reasonable opportunity, not more than 30 days after receipt of the transcript, to prepare and submit the briefs.

§ 13.232 Initial decision.

(a) *Contents.* The administrative law judge shall issue an initial decision at the conclusion of the hearing. In each oral or written decision, the administrative law judge shall include findings of fact and conclusions of law, and the grounds supporting those findings and conclusions, upon all material issues of fact, the credibility of witnesses, the applicable law, any exercise of the administrative law judge's discretion, the amount of any civil penalty found appropriate by the administrative law judge, and a discussion of the basis for any order issued in the proceedings. The

administrative law judge is not required to provide a written explanation for rulings on objections, procedural motions, and other matters not directly relevant to the substance of the initial decision. If the administrative law judge refers to any previous unreported or unpublished initial decision, the administrative law judge shall make copies of that initial decision available to all parties and the FAA decisionmaker.

(b) *Oral decision.* Except as provided in paragraph (c) of this section, at the conclusion of the hearing, the administrative law judge shall issue the initial decision and order orally on the record.

(c) *Written decision.* The administrative law judge may issue a written initial decision not later than 30 days after the conclusion of the hearing or submission of the last posthearing brief if the administrative law judge finds that issuing a written initial decision is reasonable. The administrative law judge shall serve a copy of any written initial decision on each party.

(d) *Order assessing civil penalty.* The initial decision issued by the administrative law judge shall become an order assessing civil penalty if the administrative law judge finds that an alleged violation occurred and determines that a civil penalty, in an amount found appropriate by the administrative law judge, is warrented.

§ 13.233 Appeal from initial decision.

(a) *Notice of appeal.* A party may appeal the initial decision, and any decision not previously appealed pursuant to § 13.219, by filing a notice of appeal with the FAA decisionmaker. A party shall file the notice of appeal with the Federal Aviation Administration, 800 Independence Avenue, SW., Room 924A, Washington, DC 20591, Attention: Appellate Docket Clerk. A party shall file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or service of the written initial decision on the parties and shall serve a copy of the notice of appeal on each party.

(b) *Issues on appeal.* A party may appeal only the following issues:

(1) Whether each filing of fact is supported by a preponderance of reliable, probative, and substantial evidence;

(2) Whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and

(3) Whether the administrative law judge committed any prejudicial errors during the hearing that supports the appeal.

(c) *Perfecting an appeal.* Unless otherwise agreed by the parties, a party shall perfect an appeal, not later than 50 days after entry of the oral initial decision on the record or service of the written initial decision on the party, by filing an appeal brief with the FAA decisionmaker.

(1) *Extension of time by agreement of the parties.* The parties may agree to extend the time for perfecting the appeal with the consent of the FAA decisionmaker. If the FAA decisionmaker grants an extension of time to perfect the appeal, the appellate docket clerk shall serve a letter confirming the extension of time on each party.

(2) *Written motion for extension.* If the parties do not agree to an extension of time for perfecting an appeal, a party desiring an extension of time may file a written motion for an extension with the FAA decisionmaker and shall serve a copy of the motion on each party. The FAA decisionmaker may grant an extension if good cause for the extension is shown in the motion.

(d) *Appeal briefs.* A party shall file the appeal brief with the FAA decisionmaker and shall serve a copy of the appeal brief on each party.

(1) A party shall set forth, in detail, the party's specific objections to the initial decision or rulings in the appeal brief. A party also shall set forth, in detail, the basis for the appeal, the reasons supporting the appeal, and the relief requested in the appeal. If the party relies on evidence contained in the record for the appeal, the party shall specifically refer to the pertinent evidence contained in the transcript in the appeal brief.

(2) The FAA decisionmaker may dismiss an appeal, on the FAA decisionmaker's own initiative or upon motion of any other party, where a party has filed a notice of appeal but fails to perfect the appeal by timely filing an appeal brief with the FAA decisionmaker.

(e) *Reply brief.* Unless otherwise agreed by the parties, any party may file a reply brief with the FAA decisionmaker not later than 35 days after the appeal brief has been served on that party. The party filing the reply brief shall serve a copy of the reply brief on each party. If the party relies on evidence contained in the record for the reply, the party shall specifically refer to the pertinent evidence contained in the transcript in the reply brief.

(1) *Extension of time by agreement of the parties.* The parties may agree to extend the time for filing a reply brief with the consent of the FAA decisionmaker. If the FAA decisionmaker grants an extension of time to file the reply brief, the appellate docket clerk shall serve a letter confirming the extension of time on each party.

(2) *Written motion for extension.* If the parties do not agree to an extension of time for filing a reply brief, a party desiring an extension of time may file a written motion for an extension with the FAA decisionmaker and shall serve a copy of the motion on each party. The FAA decisionmaker may grant an extension if good cause for the extension is shown in the motion.

(f) *Other briefs.* The FAA decisionmaker may allow any person to submit an *amicus curiae* brief in an appeal of an initial decision. A party may not file more than one appeal brief or reply brief. A party may petition the FAA decisionmaker, in writing, for leave to file an additional brief and shall serve a copy of the petition on each party. The party may not file the additional brief with the petition. The FAA decisionmaker may grant leave to file an additional brief if the party demonstrates good cause for allowing additional argument on the appeal. The FAA decisionmaker will allow a reasonable time for the party to file the additional brief.

(g) *Number of copies.* A party shall file the original appeal brief or the original reply brief, and two copies of the brief, with the FAA decisionmaker.

(h) *Oral argument.* The FAA decisionmaker has sole discretion to permit oral argument on the appeal. On the FAA decisionmaker's own initiative or upon written motion by any party, the FAA decisionmaker may find that oral argument will contribute substantially to the development of the issues on appeal and may grant the parties an opportunity for oral argument.

(i) *Waiver of objections on appeal.* If a party fails to object to any alleged error regarding the proceedings in an appeal or a reply brief, the party waives any objection to the alleged error. The FAA decisionmaker is not required to consider any objection in an appeal brief or any argument in the reply brief if a party's objection is based on evidence contained on the record and the party does not specifically refer to the pertinent evidence from the record in the brief.

(j) *FAA decisionmaker's decision on appeal.* The FAA decisionmaker will review the briefs on appeal and the oral argument, if any, to determine if the administrative law judge committed prejudicial error in the proceedings or that the initial decision should be affirmed, modified, or reversed. The

FAA decisionmaker may affirm, modify, or reverse the initial decision, make any necessary findings, or may remand the case for any proceedings that the FAA decisionmaker determines may be necessary.

(1) The FAA decisionmaker may raise any issue, on the FAA decisionmaker's own initiative, that is required for proper disposition of the proceedings. The FAA decisionmaker will give the parties a reasonable opportunity to submit arguments on the new issues before making a decision on appeal. If an issue raised by the FAA decisionmaker requires the consideration of additional testimony or evidence, the FAA decisionmaker will remand the case to the administrative law judge for further proceedings and an initial decision related to that issue. If an issue raised by the FAA decisionmaker is solely an issue of law or the issue was addressed at the hearing but was not raised by a party in the briefs on appeal, a remand of the case to the administrative law judge for further proceedings is not required but may be provided in the discretion of the FAA decisionmaker.

(2) The FAA decisionmaker will issue the final decision and order of the Administrator on appeal in writing and will serve a copy of the decision and order on each party.

(3) A final decision and order of the Administrator after appeal is precedent in any other civil penalty action. Any issue, finding or conclusion, order, ruling, or initial decision of an administrative law judge that has not been appealed to the FAA decisionmaker is not precedent in any other civil penalty action.

§ 13.234 Petition to reconsider or modify a final decision and order of the FAA decisionmaker on appeal.

(a) *General.* Any party may petition the FAA decisionmaker to reconsider or modify a final decision and order issued by the FAA decisionmaker on appeal from an initial decision. A party shall file a petition to reconsider or modify with the FAA decisionmaker not later than 30 days after service of the FAA decisionmaker's final decision and order on appeal and shall serve a copy of the petition on each party. The FAA decisionmaker will not reconsider or modify an initial decision and order issued by an administrative law judge that has not been appealed by any party to the FAA decisionmaker.

(b) *Form and number of copies.* A party shall file a petition to reconsider or modify, in writing, with the FAA decisionmaker. The party shall file the original petition with the FAA decisionmaker and shall serve a copy of the petition on each party.

(c) *Contents.* A party shall state briefly and specifically the alleged errors in the final decision and order on appeal, the relief sought by the party, and the grounds that support the petition to reconsider or modify.

(1) If the petition is based, in whole or in part, on allegations regarding the consequences of the FAA decisionmaker's decision, the party shall describe these allegations and shall describe, and support, the basis for the allegations.

(2) If the petition is based, in whole or in part, on new material not previously raised in the proceedings, the party shall set forth the new material and include affidavits of prospective witnesses and authenticated documents that would be introduced in support of the new material. The party shall explain, in detail, why the new material was not discovered through due diligence prior to the hearing.

(d) *Repetitious and frivolous petitions.* The FAA decisionmaker will not consider repetitious or frivolous petitions. The FAA decisionmaker may summarily dismiss repetitious or frivolous petitions to reconsider or modify.

(e) *Reply petitions.* Any other party may reply to a petition to reconsider or modify, not later than 10 days after service of the petition on that party, by filing a reply with the FAA decisionmaker. A party shall serve a copy of the reply on each party.

(f) *Effect of filing petition.* Unless otherwise ordered by the FAA decisionmaker, filing of a petition pursuant to this section will not stay or delay the effective date of the FAA decisionmaker's final decision and order on appeal and shall not toll the time allowed for judicial review.

(g) *FAA decisionmaker's decision on petition.* The FAA decisionmaker has sole discretion to grant or deny a petition to reconsider or modify. The FAA decisionmaker will grant or deny a petition to reconsider modify within a reasonable time after receipt of the petition or receipt of the reply petition, if any. The FAA decisionmaker may affirm, modify, or reverse the final decision and order on appeal, or may remand the case for any proceedings that the FAA decisionmaker determines may be necessary.

§ 13.235 Judicial review of final decision and order.

A person may seek judicial review of a final decision and order of the Administrator as provided in section 1006 of the Federal Aviation Act of 1958, as amended. A party seeking judicial review of a final decision and order shall file a petition for review not later than 60 days after the final decision and order has been served on the party.

Issued in Washington, DC on April 17, 1990.

Gregory S. Walden,

Chief Counsel.

[FR Doc. 90-9173 Filed 4-17-90; 12:23 pm]

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federal register

Friday
April 20, 1990

Part V

Department of Health and Human Services

Health Care Financing Administration

42 CFR Parts 412 and 413

Medicare Program, Fiscal Year 1990; Mid-year Changes to the Inpatient Hospital Prospective Payment System; Final Rule With Request for Comments

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 412 and 413

[BPD-672-FC]

RIN 0938-AE73

Medicare Program, Fiscal Year 1990; Mid-Year Changes to the Inpatient Hospital Prospective Payment System

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule with comment period.

SUMMARY: This final rule with comment implements several provisions of the Omnibus Budget Reconciliation Act of 1989 that affect Medicare payment for inpatient hospitals and that, in general, take effect on April 1, 1990. This final rule also responds to comments received concerning the changes we made in 1989 in implementing provisions of the Medicare Catastrophic Coverage Act of 1988 concerning adjustments applicable to prospective payment hospitals and to the target amounts of hospitals and units excluded from the prospective payment system due to the elimination of the day limitation on covered inpatient hospital days. We are making additional changes in these provisions to take into account the Medicare Catastrophic Coverage Repeal Act of 1989, and changes in the law made by the Family Support Act of 1988, which clarified the criteria for adjusting target amounts and changed the date for implementing that provision.

DATES: *Effective Date:* This final rule is effective on April 1, 1990. We refer the reader to section VI.A. of this preamble for a discussion of specific provisions that apply to specific periods.

Comment Date: Comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on June 19, 1990.

ADDRESSES. Mail comments to the following address:

Health Care Financing Administration, Department of Health and Human Services, Attention: BPD-672-FC, P.O. Box 26676, Baltimore, Maryland 21207.

If you prefer, you may deliver your comments to one of the following addresses:

Room 309-G, Hubert Humphrey Building, 200 Independence Ave., SW, Washington, DC.

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland.

Due to staffing and resource limitations, we cannot accept facsimile (FAX) copies of comments. In commenting, please refer to file code BPD-672-FC. Comments received timely will be available for public inspection as they are received, beginning approximately three weeks after publication of this document, in Room 309-G of the Department's offices at 200 Independence Ave., SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: 202-245-7890).

FOR FURTHER INFORMATION CONTACT: Barbara Wynn, (301) 966-4529.

SUPPLEMENTARY INFORMATION:

I. Summary of the Omnibus Budget Reconciliation Act of 1989

On December 19, 1989, the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101-239) was enacted. The provisions of sections 6003 (c), (e), (f), and (h)(3), 6011, 6015(a), and 6205(a) of Public Law 101-239 made the following changes that affect Medicare payments to hospitals:

- For discharges occurring on or after April 1, 1990, hospitals located in rural areas with more than 100 beds, or those that are classified as sole community hospitals, can now qualify for a disproportionate share adjustment if the hospital has a disproportionate patient percentage of at least 30 percent. In addition, the disproportionate share payment adjustments for qualifying hospitals are increased.
- For cost reporting periods beginning on or after April 1, 1990, the payment methodology for sole community hospitals is revised. In addition, the change made in the September 1, 1989 prospective payment system final rule (54 FR 36480) that went into effect on October 1, 1989 to allow any rural hospital to qualify as a sole community hospital if it is more than 35 miles from another hospital is ratified.
- For cost reporting periods beginning on or after April 1, 1990 and ending on or before March 31, 1993, a special payment method under the prospective payment system for Medicare-dependant small rural hospitals is established
- For discharges occurring on or after April 1, 1990, the wage index applicable to rural counties whose hospitals are deemed urban is revised.
- For discharges occurring on or after June 19, 1990 and before December 19, 1991, prospective payment hospitals receive an additional payment for the cost of administering blood clotting factors to hemophiliacs who are hospital inpatients.
- For cost reporting periods beginning on or after April 1, 1990, excluded hospitals and units may be assigned a new base period for purposes of the rate-of-increase limits if it would be more representative of the reasonable and necessary costs of inpatient services.
- For cost reporting periods beginning on or after December 19, 1989 and before the later of October 1, 1990 or the date the Secretary issues new regulations concerning payment for nursing and allied health education, the costs incurred by hospitals that meet certain criteria for training nursing students enrolled in a hospital-based nursing school are to be paid on the basis of reasonable cost.

Our implementation of these provisions are described below in section II. of this preamble. In section III.D. of this final rule, we respond to comments received on the September 30, 1988 prospective payment system final rule with comment (53 FR 38476) concerning the changes we made in implementing two provisions of the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100-360) concerning adjustments to the rates, weights, and outlier thresholds applicable to prospective payment hospitals and the target amounts applicable to hospitals and units excluded from the prospective payment system due to the elimination of the day limitation on covered inpatient hospital days.

In that section we also discuss changes in law made by the Family Support Act of 1988 (Pub. L. 100-485), which clarified the criteria for adjusting target amounts and changed the date for implementing that provision, as well as the termination of these catastrophic provisions effective January 1, 1990 because of the enactment of the Medicare Catastrophic Coverage Repeal Act of 1989 (Pub. L. 101-234).

II. Provisions of the Final Rule Resulting From the Enactment of the Omnibus Budget Reconciliation Act of 1989

A. Wage Index

Under section 1886(d)(8)(B) of the Act, for discharges occurring on or after October 1, 1988, hospitals in certain rural counties adjacent to one or more Metropolitan Statistical Areas (MSAs) are considered to be located in one of the adjacent MSAs if certain standards are met. Under this provision, as a part of the September 30, 1988 prospective payment system final rule (53 FR 38476), we classified the wage data for those rural areas as if the hospitals in those areas were located in the adjacent MSAs and recomputed the wage index values for the affected MSAs and rural areas.

Because inclusion of the wage data from rural hospitals that are considered to be located in an adjacent MSA under section 1886(d)(8)(B) of the Act resulted in the reduction of the wage index values of several MSAs and rural areas, Congress enacted section 8403(a) of the Technical and Miscellaneous Revenue Act of 1988 (Pub. L. 100-647). Under that provision, which added a new section 1886(d)(8)(C) to the Act, if the inclusion of wage data from rural hospitals now considered to be located in an urban area results in a reduction of the wage value for the affected MSA or rural area, then the wage index values for those affected areas are determined as if section 1886(d)(8)(B) of the Act had not been enacted. The wage index value for those rural counties with hospitals that were deemed urban are determined on a county-specific basis as if the county were a separate urban area. This provision was implemented as part of the September 1, 1989 prospective payment system final rule (54 FR 36476).

For some hospitals in counties redesignated as urban under the provisions of section 1886(d)(8)(B) of the Act, the application of county-specific wage index values for Federal fiscal year (FY) 1990 resulted in lower total prospective payments than what those hospitals had received in FY 1989 because those hospitals were now subject to a lower wage index value. For some redesignated hospitals such as those that had a county-specific wage index value lower than the Statewide rural wage index, the decrease in payment was significant. In fact, the county-specific wage index value was sufficiently low in some cases that the hospitals redesignated as urban received lower payments than when they had been designated as rural.

In order to address the adverse impact on certain redesignated hospitals that resulted from the implementation of section 8403(a) of Public Law 100-647, Congress, in section 6003(h) of Pub. L. 101-239, revised the methodology for applying the wage index to hospitals affected by section 1886(d)(8)(B) of the Act.

Under section 6003(h)(3) of Public Law 101-239, section 1886(d)(8)(C) of the Act was revised with respect to discharges occurring on or after April 1, 1990. The provision revises the application of the wage index to redesignated hospitals based on the hypothetical impact the wage data from these hospitals would have on the wage index value of the MSA to which they have been redesignated.

- If including the wage data for the redesignated hospitals reduces the MSA wage index value by one percentage point or less, the MSA wage index value applies to the redesignated hospitals deemed to be part of that MSA. The MSA wage index value is determined exclusive of the wage data for the designated hospitals.
- If including the wage date for the redesignated hospitals reduces the MSA wage index value by more than one percentage point on an MSA's wage index, the wage index is applied separately to the MSA and to the hospitals deemed to be part of that MSA. In this case, the redesignated hospitals will continue to have their wage index determined on a county-specific basis, as if their county were a separate urban area. However, the wage index for such county will not be less than the Statewide rural wage index.
- Rural areas whose wage index values would be reduced by excluding the data for redesignated hospitals will continue to have their wage index calculated as if no redesignation had occurred. Those rural areas whose wage index values increased as a result of excluding the wage data for the redesignated hospitals will continue to have their wage index calculated exclusive of the redesignated hospitals.

The counties subject to the wage index of the MSA to which their hospitals were redesignated (that is, their impact on the MSA wage index would be one percentage point or less) are set forth in table 2a of the addendum to this document. The counties subject to a separate urban area wage index (that is, their impact on the MSA wage index would be greater than one percentage point) with a minimum wage index value equal to the Statewide rural wage index are set forth in tables 2b and 2c of the addendum to this document. A few counties are not included in the table even though they meet the criteria to permit hospitals to be redesignated. They are not included in the tables because there are no prospective payment hospitals in those counties.

B. Payments to Sole Community Hospitals (Section 412.92)

Under the prospective payment system, special payment protections are provided to sole community hospitals (SCHs). Prior to enactment of Public Law 101-239, section 1886(d)(5)(C)(ii) of the Act defined an SCH as a hospital that, by reason of factors such as isolated location, weather conditions, travel conditions, or absence of other hospitals (as determined by the Secretary), is the sole source of inpatient hospital services reasonably available to Medicare beneficiaries. The regulations that set forth the criteria that a hospital must meet to be classified as an SCH are at § 412.92(a). To be classified as an SCH, a hospital must either have been designated as an SCH prior to the beginning of the prospective payment system or it must be located in a rural area and meet one of the following requirements:

- It is located more than 35 miles from other like hospitals.
- It is located between 25 and 35 miles from other like hospitals, and it—
  - —Serves at least 75 percent of inpatients in its service area; or
  - —Has fewer than 50 beds and would qualify on the basis of serving 75 percent of its area's inpatients except that some patients seek specialized care unavailable at the hospital.
- It is located between 15 and 35 miles from other like hospitals and isolated by local topography or extreme weather for 30 days in each 2 out of 3 years.

SCHs are currently paid a blended rate based on 75 percent of the hospital-specific rate and 25 percent of the Federal regional rate. For cost reporting periods beginning before October 1, 1990, an SCH is eligible for a payment adjustment if, for reasons beyond its control, it experiences a decline in volume of greater than 5 percent compared to its preceding cost reporting period. (This adjustment is also available to a hospital that could qualify as an SCH but chooses not to be paid as an SCH.) In addition, an SCH is eligible for an adjustment to its payments if it adds new services or facilities. SCHs are also exempt from the percentage reductions in reasonable cost payments for capital-related costs, as provided in section 1886(g)(3) of the Act.

Sections 6003(e) (1) and (2) of Public Law 101-239, which amend section 1886(d)(5) of the Act, make changes in the qualifying criteria and payment methodology for SCHs. In this final rule, we are addressing only those changes that require immediate implementation (that is, by April 1, 1990).

We first wish to note that section 6003(e)(3) of Public Law 101-239 specifically states that any hospital classified as an SCH as of the date of enactment of Public Law 101-239 (December 19, 1989) will continue to be so classified regardless of whether it meets the revised criteria resulting from changes made in implementing section 6003(e)(1) of Public Law 101-239.

Section 1886(d)(5)(D)(iii)(I) of the Act incorporates the mileage standard that was established by regulation effective October 1, 1989. (See the September 1, 1989 prospective payment system final rule (54 FR 36480).) That is, section 1886(d)(5)(D)(iii)(I) of the Act states that

a hospital can qualify for SCH status if it is more than 35 road miles from another hospital. We believe that in adding this provision to the law, Congress intended to ratify our regulations and we are, therefore, not altering any of the policies or definitions regarding the mileage criterion that we have previously adopted. That is, we believe that the mileage should continue to be measured by the shortest route over improved roads maintained by any local, State, or Federal government entity for public use. Also, we see no evidence that Congress intended that we revise our current policy requiring that the distance between hospitals be measured to the nearest "like" hospital as defined in § 412.92(c)(2). We consider "like" hospitals to be those hospitals furnishing short-term acute care. That is, a hospital may not qualify for an SCH classification on the grounds that neighboring hospitals do not offer comparable specialty services. Rural hospitals that are located fewer than 35 road miles from the nearest like hospital can continue to qualify for SCH classification by meeting the criteria at § 412.92 (a)(2) or (a)(3). The application procedures to be followed, the documentary evidence that must be submitted, and the effective date for qualification remain the same as specified in existing regulations.

Section 1886(d)(5)(D) of the Act also requires that the Secretary publish standards to determine whether a hospital meets the criteria for classification as an SCH based on the time required for an individual to travel to the nearest alternative source of appropriate inpatient care. We plan to propose these standards in the proposed rule concerning FY 1991 changes to the inpatient hospital prospective payment system and FY 1991 rates.

Section 6003(e) of Public Law 101-239 also revised the payment methodology for hospitals classified as SCHs effective with hospital cost reporting periods beginning on or after April 1, 1990. As of that date, as provided in section 1886(d)(5)(D)(i) of the Act, SCHs will be paid based on whichever of the following rates yields the greatest aggregate payment for the cost reporting period: the Federal national rate applicable to the hospital, the updated hospital-specific rate based on FY 1982 cost per discharge, or the updated hospital-specific rate based on FY 1987 cost per discharge.

The SCH's fiscal intermediary will determine for each cost reporting period which of the payment options will yield the highest rate of payment. Payments will automatically be made at the highest rate using the best data available at the time of the intermediary's determination. However, it may not be possible for the fiscal intermediary to determine in advance precisely which of the rates will yield the highest payment by year's end. This is because, in many instances, the hospital's FY 1987 cost report has not yet been audited and, in all instances, it is not possible to forecast the October 1, 1990 update factor for the Federal rates, outlier payments, the amount of the disproportionate share adjustment, or the indirect medical education adjustment, all of which are applicable only to payment based on the Federal rate. Therefore, the intermediary will make its determination based on what appears to yield the highest payment amount.

A final adjustment will be made at the close of the cost reporting period to determine precisely which of the three payment rates yielded the highest payment to the hospital. The settlement will take into account the adjustments described above. This is the same procedure currently in effect for both disproportionate share adjustments and indirect medical education adjustments.

We considered making the payment methodology decision completely prospective and paying SCHs on the highest of the three rates without taking into account changes in the Federal payment amounts during the hospital's cost reporting period. However, since we cannot prospectively determine with certainty which rate will yield the highest payment, the hospital may not be paid prospectively on the basis of the rate that would ultimately result in the greatest payment. To pay each hospital the correct amount, we will make a final adjustment at the end of the cost reporting period. We believe this is the only way to ensure that each hospital actually receives the highest payment available. We note that a new determination of which payment rate yields the highest total payment will be made at the start of each cost reporting period.

If a hospital disagrees with the intermediary's determination regarding the final amount of program payment to which it is entitled under this provision, it has the right to appeal the intermediary's decision in accordance with the criteria in subpart R of part 405 of the regulations, which concern provider payment determinations and appeals.

Section 1886(b)(3)(C) following (ii) of the Act provides that an SCH, for purposes of determining its payment rate based on the higher of the Federal rate or its hospital-specific rate, may substitute the hospital's cost reporting period, if any, beginning during FY 1987 for the FY 1982 base cost reporting period if that substitution results in an increase in the hospital's rate.

In calculating a hospital's hospital-specific rate based on its FY 1987 cost reporting period, we will, to the extent possible, use the same methodology as we did to calculate the hospital-specific rate based on a FY 1982 cost reporting period. That methodology is set forth in §§ 412.71 through 412.73 and was discussed in detail in several prospective payment system documents published in the **Federal Register** (September 1, 1983 (48 FR 3977); January 3, 1984 (49 FR 259); and June 1, 1984 (49 FR 23010)).

The FY 1987 cost reporting periods are those 12-month or longer cost reporting periods ending on or after September 30, 1987, and before September 30, 1988. If the hospital's last cost reporting period ending before September 30, 1988, is for a period that is less than 12 months, we will use the hospital's most recent 12-month or longer cost reporting period ending before the short period report.

If a hospital has no cost reporting period beginning in FY 1987, it will not have a hospital-specific rate based on FY 1987. The hospital will not be allowed to substitute any other base period for the FY 1987 base period. This policy is based on the language of section 1886(b)(3)(C) following (ii) of the Act, which states that the hospital will be allowed to substitute its cost reporting period (if any) beginning in FY 1987. Therefore, if there is no FY 1987 cost reporting period, there will be no substitution of any other cost reporting period.

For each SCH, the intermediary will calculate a hospital-specific rate based on the hospital's FY 1987 cost report as follows:

- Determine the hospital's total allowable Medicare inpatient operating cost, as stated on the FY 1987 cost report.
- Divide the total Medicare operating cost by the number of Medicare discharges in the cost reporting period to determine the FY 1987 base period cost per case.
- In order to take into consideration the hospital's individual case-mix, the base year cost per case is divided by the hospital's case-mix index applicable to the FY 1987 cost reporting period. This step is necessary to standardize the hospital's base period cost for case mix. This is consistent with our treatment of FY 1982 base-period costs per case. A hospital's case mix is computed based

on its Medicare patient discharges subject to DRG-based payment. (The individual case-mix index values to be used in calculating the FY 1987 hospital-specific rate are set forth in Table 3d of this document.)

The fiscal intermediary will inform each SCH of its hospital-specific rate based on its FY 1987 cost reporting period within 180 days after the start of its cost reporting period beginning on or after April 1, 1990 (the first period to which the new payment methodology applies).

Our original policy on modification of FY 1982 base-period costs, as stated in § 412.72, provided that the intermediary may adjust base-period costs to take into account additional costs recognized as allowable costs for the hospital's base period through administrative action and judicial review, but only on a prospective basis. That is, any adjustment made to base-period costs would be effective with the first day of the hospital's cost reporting period beginning on or after the date of the decision to adjust the costs and would not be applied on a retroactive basis.

However, since we formulated our policy on modification to base-period costs, a decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Georgetown University Hospital* v. *Bowen*, 862 F.2d 323, (D.C. Cir., 1988), has invalidated that policy. In that decision, the court rejected the principles and procedures established by Medicare regulations that authorize automatic prospective adjustments to the hospital-specific rate to reflect newly recognized base-period costs. On January 26, 1989, HCFA issued a ruling (HCFAR 89-1-1) that the hospital-specific rate based on FY 1982 will be revised retroactively to reflect additional base-period costs that are or will be recognized as the result of—

- A final, nonappealable court judgment; or
- The administrative actions defined in § 412.72(a)(3)(i), that is:

—A reopening and revision of the hospital's base-period notice of amount of program reimbursement under §§ 405.1885 through 405.1889;

—A prehearing order or finding issued during the provider payment appeals process by the appropriate reviewing authority under § 405.1821 or § 405.1852 that resolved a matter at issue concerning the hospital's base-period notice of amount of program reimbursement;

—An affirmation, modification, or reversal of a Provider Reimbursement Review Board decision by the Administrator of HCFA under § 405.1875 that resolved a matter at issue in the hospital's base-period notice of amount of program reimbursement; or

—An administrative or judicial review decision under § 405.1831, § 405.1871, or § 405.1877 that is final and no longer subject to review under applicable lower regulations by a higher reviewing authority and that resolved a matter of issue in the hospital's base-period notice of amount of program reimbursement.

We are adopting these policies regarding the FY 1982 base-period costs for the FY 1987 base-period costs. Any time the FY 1987 base-period costs are subject to modification for one of the reasons set forth above, the adjustment will be retroactive to the time of the intermediary's initial calculation of base-period costs. We are adding a new § 412.75 to describe calculations of a hospital-specific rate based on a FY 1987 base period.

In addition to the changes in qualifying criteria and payment methodology, the new section 1886(d)(5)(D) of the Act deleted the sunset date on the 5 percent volume decline adjustment, thus allowing SCHs to receive the adjustment indefinitely. (The sunset provision was in section 1886(d)(5)(C)(ii) of the Act. Section 6003(c)(1) of Public Law 101-239 amended that provision and redesignated it as section 1886(d)(5)(D) of the Act.) We are amending § 412.92 (e) and (f) to reflect this change.

C. Disproportionate Share Adjustment (Section 412.106)

Section 1886(d)(5)(F) of the Act provides for additional payments to prospective payment hospitals that serve a disproportionate share of low-income patients. Under section 1886(d)(5)(F)(v) of the Act, and under section § 412.106(b) of the regulation, a hospital qualifies for a disproportionate share adjustment if during the hospital's cost reporting period, the hospital has a disproportionate patient percentage that is at least equal to—

- 15 percent for an urban hospital with 100 or more beds or a rural hospital with 500 or more beds;
- 40 percent for an urban hospital with fewer than 100 beds;
- 45 percent for a rural hospital with fewer than 500 beds.

Additionally, a hospital can qualify for a disproportionate share adjustment as defined under § 412.106(c)(2) if the hospital has 100 or more beds, is located in an urban area, and receives more than 30 percent of net inpatient revenues from State and local government sources for the care of indigent patients not eligible for Medicare or Medicaid.

Section 6003(c)(2) of Public Law 101-239 adds an additional qualifying methodology under section 1886(d)(F)(5)(v) of the Act for certain rural hospitals beginning with discharges occurring on or after April 1, 1990. That is, if a hospital located in a rural area has more than 100 beds, or is classified as a sole community hospital, and has a disproportionate patient percentage of a least 30 percent during its cost reporting period, the hospital will qualify for a disproportionate share adjustment.

Sections 1886(d)(5)(F) (iii) and (iv) of the Act define the allowable disproportionate share adjustments that are added to the Federal portion of Medicare prospective payments for those hospitals described in sections 1886(d)(5)(F) (i) and (v) of the Act that meet the disproportionate share qualifications. Currently those adjustments are—

- 2.5 percent plus one-half of the difference between the hospital's disproportionate patient percentage and 15 percent for urban hospitals with 100 or more beds and rural hospitals with 500 or more beds;
- 5 percent for urban hospitals with fewer than 100 beds;
- 4 percent for rural hospitals with fewer than 500 beds; and
- 25 percent for urban hospitals with 100 or more beds receiving more than 30 percent of net inpatient revenues from State and local government sources for the care of indigent patients.

In addition, sections 6003(c) (2) and (3) of Public Law 101-239 amended section 1886(d)(5)(F) of the Act, which concerns the payment methodology for determining disproportionate share payment adjustments effective with discharges occurring on or after April 1, 1990. These changes provide for the following:

- The disproportionate share payment adjustment factor will be increased from 25 to 30 percent for a hospital that qualifies for a disproportionate share adjustment under § 412.106(c)(2), that is, the hospital has 100 or more beds, is located in an urban area, and receives more than 30 percent of net inpatient revenues from State and local government sources for the care of indigent patients not eligible for Medicare or Medicaid.
- A hospital located in an urban area and having 100 or more beds, or a hospital located in a rural area and having 500 or more beds, with a disproportionate patient percentage of greater than 20.2 percent will receive a disproportionate share adjustment that will increase the DRG revenue by 5.62

percent plus 65 percent of the difference between its disproportionate patient percentage and 20.2 percent. If the hospital's disproportionate patient percentage is less than 20.2 percent, the hospital's DRG revenue will be increased by 2.5 percent plus 60 percent of the difference between its disproportionate patient percentage and 15 percent.

- A hospital located in a rural area that is classified as both a rural referral center and an SCH will receive a disproportionate share adjustment that will increase the Federal portion of the hospital's DRG revenue by the greater of 10 percent, or 4 percent plus 60 percent of the difference between the hospital's disproportionate patient percentage and 30 percent.
- A hospital located in a rural area and classified as a rural referral center will receive a disproportionate share adjustment that will increase the hospital's DRG revenue by 4 percent plus 60 percent of the difference between its disproportionate patient percentage and 30 percent.
- A hospital located in a rural area and classified as an SCH will receive a disproportionate share adjustment that will increase the Federal portion of the hospital's DRG revenue by 10 percent.

For a hospital with fewer than 100 beds located in an urban area, the disproportionate share adjustment will continue to be 5 percent. For a hospital with fewer than 500 beds located in a rural area, which is not classified as a rural referral center or sole community hospital, the disproportionate share adjustment will continue to be 4 percent.

D. Medicare-Dependent, Small Rural Hospitals (Section 412.108)

Section 6003(f) of Public Law 101–239, which added a new section 1886(d)(5)(G) of the Act, creates a new category of hospitals eligible for a special payment adjustment under the prospective payment system. The adjustment is limited to Medicare-dependent, small rural hospitals (MDHs) and is effective for cost reporting periods beginning on or after April 1, 1990 and ending on or before March 31, 1993. Section 1886(d)(5)(G)(iii) of the Act defines an MDH as any hospital that meets all of the following criteria:

- The hospital is located in a rural area.
- The hospital has 100 or fewer beds.
- The hospital is not classified as an SCH (as defined at § 412.92) at the same time that it is receiving payment under this provision.
- In the hospital's cost reporting period that began during FY 1987, not less than 60 percent of its inpatient days or discharges were attributable to patients covered by Medicare Part A benefits.

The term "rural area" will be defined as it is for all other prospective payment special adjustments, that is, any area outside an urban area as provided under § 412.63(b). Thus, a hospital in a rural county that is redesignated as urban under section 1886(d)(8)(C) of the Act would not be considered to be located in a rural area for the purposes of eligibility as an MDH.

Similarly, for purposes of determining a hospital's bed size, we will use the same definition that is currently used for determining number of beds to calculate the indirect medical education adjustment, the disproportionate share adjustment, and the rural referral center adjustments. This definition, which is set forth at § 412.118(b), states that the number of beds in a hospital is determined by counting the number of available bed days during the hospital's cost reporting period, not including beds assigned to newborns, custodial care, and excluded distinct part units, and dividing that number by the number of days in the cost reporting period. Instructions for counting bed size for purposes of the indirect medical education adjustment as set forth in § 2405.3G of the Provider Reimbursement Manual (HCFA Pub. 15–1) will also be used for determining bed size for MDHs. (That is, beds used for purposes other than inpatient lodging, beds certified as long term, and temporary beds are not counted. However, beds in a temporarily closed wing or partially closed wing are counted if the wing can be immediately opened and the beds occupied.)

For determining whether at least 60 percent of the hospital's inpatient days or discharges were attributable to Medicare Part A beneficiaries, days and discharges will be counted from the hospital's 12-month or longer cost reporting period that ended on or after September 30, 1987 and before September 30, 1988. Only days and discharges from acute care inpatient hospital stays in the area of the hospital subject to the prospective payment system will be included.

If the hospital's last cost reporting period ending before September 30, 1988 is for a period that is less than 12 months, days and discharges will be counted for the hospital's most recent 12-month or longer cost reporting period ending before the short period report. We believe that, in calculating the Medicare utilization, we must use a complete 12-month cost reporting period in order to avoid the determination being made on a shorter period that covers fewer months that might not be reflective of a hospital's full-year utilization due to seasonal fluctuations in Medicare inpatient load. This will also result in our using the same cost reporting period for qualification as we are using to determine the hospital's FY 1987 hospital-specific rate. (See discussion on SCH payment methodology in section II.B., above and MDH payment methodology below.) Days and discharges from swing beds will be counted if the discharges were for acute care inpatient hospital stays. The Medicare count of days and discharges will include only those days and inpatient stays for which benefits were payable under part A.

In order to not disadvantage hospitals that receive payment from a health maintenance organization (HMO) or a competitive medical plan (CMP) for inpatient care provided to Medicare Part A beneficiaries enrolled with the HMO or CMP, the days and discharges for those stays will be counted. These days and discharges do not appear on the hospital's cost report as Medicare days and discharges. Thus, the hospital should notify its intermediary and provide documentary evidence to support the number of days and discharges attributable to Medicare HMO or CMP enrollees that should be included in the intermediary's determination of the hospital's Medicare utilization.

Days and discharges from distinct part units excluded from the prospective payment system and from newborn nursery units will not be counted. These definitions of days and discharges will apply to both the numerator (Medicare patient count) and the denominator (total patient count) in determining whether a hospital was at least 60 percent Medicare-dependent during FY 1987. A hospital that does not have an FY 1987 cost reporting period will not be able to qualify for this special payment adjustment. Section 1886(d)(5)(iii) of the Act clearly provides that the hospital must have been 60 percent Medicare-dependent in its cost reporting period beginning in FY 1987.

In determining whether the 60 percent utilization standard is met for days or discharges, there will be no rounding of the utilization percentage. That is, if a hospital had 59.4 percent or 59.7 percent for days or discharges, it will not meet the criterion. The language of section 1886(d)(5)(G)(iii) of the Act is clear in stating that "* * * *not less than* 60 percent of inpatient days or discharges during the cost reporting period beginning in fiscal year 1987 were attributable to inpatients entitled to

benefits under Part A." (Emphasis added.) We realize that some hospitals may fail to meet the standard by a narrow margin and thus may not qualify as MDHs. Whenever numeric standards are established, there will be those entities that narrowly miss meeting them as well as those that narrowly succeed in meeting them. Regardless of the standards selected, this will be true. If we did allow exceptions to these criteria, they would have to be limited to certain tolerances that, again, some hospitals would fail to meet by a small margin.

As set forth in section 1886(d)(5)(G)(i) of the Act, hospitals meeting the above criteria will be paid based on whichever of the following rates yields the greatest aggregate payment for the cost reporting period: the national Federal rate applicable to the hospital, the updated hospital-specific rate using FY 1982 cost per discharge, or the updated hospital-specific rate using FY 1987 cost per discharge. (See discussion above in section II.B. for a detailed description of the calculation of a hospital-specific rate based on an FY 1987 base period.)

Hospitals do not need to take any action to qualify for this adjustment. The fiscal intermediary will determine for each cost reporting period which hospitals meet the criteria to qualify as MDHs prior to the start of the hospital's first cost reporting period beginning on or after April 1, 1990. In addition, similar to our treatment of SCHs, the intermediary will determine for each cost reporting period which of the payment options will yield the highest rate of payment to a hospital that qualifies as an MDH. Payments will automatically be made at the highest rate using the best data available at the time of the intermediary determination. However, as with SCHs, since it may not be possible for the fiscal intermediary to determine in advance precisely which of the rates will yield the highest payment by year's end, the intermediary will make its determination based on what appears to yield the highest rate. A final adjustment will be made at the close of the cost reporting period to determine precisely which of the three payment rates yielded the highest payment to the hospital.

At the time of the year-end settlement, an MDH's cost report will also be reviewed to ensure that it meets all the qualifying criteria, that is, that it is located in a rural area, that its bed count for the cost reporting period was 100 or fewer beds, and that it did not qualify as an SCH at the same time that it was receiving payments as an MDH.

For purposes of counting beds, the most recently submitted cost report will be used by the fiscal intermediary to determine whether a hospital meets this criterion provisionally. A final determination will be made each year based on its average number of beds during the cost reporting period. If a hospital's number of beds has changed since its most recent cost report was submitted and it believes it meets the criteria to qualify for this adjustment, the hospital must notify its intermediary and submit documentary evidence that its bed count is not above 100 beds.

As discussed above, the intermediary will use the hospital's FY 1987 cost report to determine if it meets the 60 percent Medicare dependency requirement on the basis of either days or discharges. If a hospital believes that the data in its cost report do not accurately reflect its Medicare utilization, it must notify its intermediary and submit verifiable documentation to prove that it meets the 60 percent Medicare-patient utilization requirement.

Whether the intermediary determines a hospital's classification as an MDH based on its own data or after a hospital's request, the classification will be effective with the start of the cost reporting period in which the hospital first meets all the qualifying criteria effective with the first cost reporting period that begins on or after April 1, 1990.

Each MDH will be informed of its FY 1987-based hospital-specific rate within 180 days after it qualifies as an MDH. That is, any hospital that the intermediary identifies as qualifying for MDH status will be notified of its hospital-specific rate within 180 days after the start of its cost reporting period beginning on or after April 1, 1990. However, any hospital that is identified as an MDH by the intermediary after the start of its cost reporting period will be notified of its hospital-specific rate within 180 days after the intermediary determines that it meets the qualifying criteria.

We note that there would be no advantage to a hospital currently approved as an SCH to give up that status to qualify for the MDH adjustment since the payment provisions for both are identical and MDHs are also entitled to the same volume adjustment protection (described below) that is afforded to SCHs. However, a hospital might wish to qualify for SCH status to take advantage of the higher rate for capital payments afforded to these hospitals. If a hospital that qualifies as an MDH also meets the criteria to qualify for SCH status, it can switch to SCH status by submitting a request to its fiscal intermediary and demonstrating that it meets the qualifying criteria for SCH status under § 412.92.

A hospital's status as an MDH will be terminated on the same date as its SCH status becomes effective. As provided in § 412.92(b)(2), that status is effective 30 days after the date of HCFA's written notification of approval. We note that § 412.92(b)(2) currently states that HCFA's notification of approval is given to the hospital. However, the notification actually is sent to the intermediary. Therefore, we are revising § 412.92(b)(2) by deleting the words "to the provider."

Section 1886(d)(5)(G)(ii) of the Act also provides that a hospital meeting the MDH criteria is entitled to an additional adjustment if, due to circumstances beyond its control, its total number of discharges in a cost reporting period has decreased by more than 5 percent compared to the number of discharges in its preceding cost reporting period. Since this adjustment for a 5 percent reduction in discharges is identical to the criteria and adjustment currently provided for SCHs, we are incorporating the same criteria and adjustments into the regulation for MDHs

Effective October 1, 1989, the responsibility for processing volume adjustments for SCHs was transferred from HCFA's central office to the Medicare fiscal intermediaries. Therefore, the review of and a determination on a request for this adjustment in payment for a Medicare-dependent, small rural hospital will be made by the hospital's intermediary.

The basic test for evaluating a hospital's request for special payment due to circumstances beyond its control (in this case, a decrease in volume) is whether the decrease in volume is the result of an unusual situation or occurrence that is both externally imposed on the hospital and beyond its control. These situations may include, but are not limited to, strikes, fires, floods, inability to recruit essential physician staff, unusual, prolonged, and severe weather conditions that affect the local economy, the closing of a major employer in the hospital's service area resulting in decreased population or loss of inpatient health insurance coverage for large numbers of people, and similar unusual occurrences with substantial cost effects.

In comparing discharges, the number of discharges in a cost reporting period is compared to the number of discharges in the immediately preceding cost

reporting period. This policy is based on the language in section 1886(d)(5)(G)(ii) of the Act which states that this additional payment is available in the case of an MDH "that experiences, in a cost reporting period compared to the *previous* cost reporting period, a decrease of more than five percent in its total number of inpatient cases due to circumstances beyond its control * * *." (Emphasis added.) Thus, if a hospital experiences an occurrence that results in a sustained decrease in cases, an adjustment would be made for the cost reporting period in which the change occurred (if it were at least a 5 percent decrease), but the adjustment would not be made during subsequent periods unless discharges decrease by at least another 5 percent. Section 1886(d)(5)(G) of the Act does not allow us to add together volume declines occurring in more than one year to meet the 5 percent volume decrease requirement. Therefore, a hospital that has volume declines of 2 percent in one year and 4 percent in the next year is not entitled to an adjustment for either year. Under section 1886(d)(5)(G)(ii) of the Act, the payment adjustment is made to compensate the hospital for the fixed costs it incurs in the period in providing inpatient hospital services including the reasonable cost of maintaining necessary core staff and services for the one year period in which the volume decline occurs.

Fixed costs are defined as those over which management has no control. Many truly fixed costs, for example, rent, interest, and depreciation, are capital-related costs and are paid on a reasonable cost basis, regardless of patient volume. Variable costs, on the other hand, are those costs for items and services that vary directly with utilization. However, in a hospital setting, many costs are neither perfectly fixed nor perfectly variable, but are semifixed. Semifixed costs are those costs for items and services that are essential for the hospital to maintain operation but which will also vary with volume. For purposes of this adjustment, many semifixed costs, such as personnel-related costs, may be considered as fixed costs on a case-by-case basis. An adjustment will not be made for truly variable costs, such as food and laundry services.

In evaluating semifixed costs, such as personnel, the intermediary will consider the length of time the hospital has experienced a decrease in utilization. For a short period of time, most semifixed costs would be considered fixed. As the period of decreased utilization continues, we would expect a cost-efficient hospital to take some action to reduce unnecessary expenses. Therefore, if a hospital does not reduce unnecessary expenses, we would not include such costs in determining the amount of the adjustment.

Section 1886(d)(5)(G)(ii) of the Act requires that the adjustment amount "fully compensate the hospital for the fixed costs it incurs in the period in providing inpatient hospital services, including the reasonable cost of maintaining necessary core staff and services." The intermediary will review the determination concerning core staff and services based on an individual hospital's needs and circumstances; for example, the intermediary will take into account the minimum staffing levels required by State agencies.

In addition, we believe that section 1886(d)(5)(G)(ii) makes it clear that a hospital that has continued to make a profit under the prospective payment system, even though there has been a decline of more than 5 percent in occupancy, is not entitled to receive a payment adjustment. A hospital that receives payments that are greater than the hospital's Medicare inpatient operating costs has been "fully compensated" for those costs by the prospective payment system. Consequently, we do not believe that any additional adjustment is warranted.

We recognize that some rural hospitals experiencing a volume decline may be having financial difficulties despite the fact that they have recovered their full Medicare inpatient operating costs under the prospective payment system. While it may be true that some hospitals are suffering financial hardship for any number of reasons, it is clearly inappropriate for Medicare to share in the costs attributable to non-Medicare beneficiaries. Therefore, we wish to clarify that any adjustment amounts granted to a Medicare-dependent, small rural hospital may not exceed the difference between the hospital's Medicare inpatient operating costs and total payments made under the prospective payment system, including outlier payments, disproportionate share adjustment amounts and indirect medical education payment amounts.

An MDH that believes it qualifies for this adjustment must submit a written request to its Medicare fiscal intermediary. The requests must clearly document the circumstances causing the decrease in patient volume and the resulting effect on the hospital's costs. The request must show how the hospital reacted to the decline in volume, that is, what actions it took to control costs once it became evident that the circumstances beyond its control would cause a decline in volume of patient service. The hospital's request must be submitted within 180 days from the date of the notice of amount of program reimbursement (NPR) for the cost reporting period in question. The intermediary will make its determination and notify the hospital within 180 days from the date it receives the hospital's request and all of the required documentation.

E. Ceiling on Rate of Hospital Cost Increases (Section 413.40)

Section 101 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) (Pub. L. 97–248) added section 1886 to the Act to establish a ceiling on the allowable rate of increase for hospital inpatient operating costs. This ceiling still applies to hospitals and units excluded from the prospective payment system. Excluded hospital and hospital units under section 1886(d)(1)(B) of the Act include psychiatric, rehabilitation, children's long-term hospitals, and psychiatric and rehabilitation distinct-part units of acute care hospitals. (Prior to FY 1988, alcohol/drug hospitals and distinct-part units were also excluded from the prospective payment system, but are now under the prospective payment system.)

These excluded hospitals and units receive payment for the inpatient hospital services they furnish on the basis of reasonable cost up to a ceiling. Under the rate of increase limits, an annual target amount (stated as inpatient operating cost per discharge) is set for each hospital, based on the hospital's own cost experience in its base year. This target amount is applied as a ceiling on the allowable costs per discharge for the hospital's next cost reporting period.

A hospital that has inpatient operating costs per discharge in excess of its target amount would be paid no more than that amount. However, a hospital that has inpatient operating costs less than its target amount would be paid its costs plus the lower of:

(1) 50 percent of the difference between the inpatient operating cost per discharge and the target amount; or

(2) 5 percent of the target amount.

Each hospital's target amount is adjusted annually, before the beginning of its cost reporting period, by an applicable target rate percentage for the 12-month period. The limit is based on an assumption that a provider's year-to-year inpatient operating costs should remain comparable to its base year,

except for inflation. Section 1886(b)(4)(A) of the Act gives the Secretary the authority to grant an exemption from, or an adjustment or exception to, the target rate of increase limit where events beyond the hospital's control or extraordinary circumstances create a distortion in the increase in costs.

Section 6015 of the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101–239) amended the target rate adjustment authority contained in section 1886(b)(4)(A) of the Act to provide that a hospital or excluded unit may be assigned a new base year in lieu of adjustments to the existing target rate. Thus, the aassignment of a new base period is another mechanism HCFA may use, when appropriate, in determining the payment amount to an excluded hospital that has exceeded its ceiling in a cost reporting period. Section 6015 of Pub. L. 101–239 requires the Secretary to publish instructions by June 19, 1990 that set forth the application process under which hospitals may request target rate exemptions and adjustments.

1. Base Period

Section 1886(b)(3) of the Act provides for the use of a particular 12-month cost reporting period as the base period that serves as the basis for future periods' cost per case (that is, the target amount) after updating by the applicable percentage increase. The base period is the first cost reporting period of the excluded hospital or unit beginning before the period for which section 1886(b) of the Act applies. Section 1886(b)(5) of the Act gives the Secretary the authority to determine the applicable 12-month period to use as the base period for excluded hospitals or hospital units that have a cost reporting period that is other than 12 months in duration. This policy is set forth in regulations at § 413.40(b).

A hospital's fiscal intermediary calculates the target amount by dividing the allowable inpatient operating costs as defined under section 1886(a)(4) by the number of Medicare discharges in the base year cost reporting period. A hospital could incur costs that exceed its ceiling due to extraordinary circumstances such as flood, fire, earthquake or similar unusual occurrences, or some other factor that has caused a distortion in the comparison of the base year and the applicable cost reporting period. Under section 1886(b)(4)(A) of the Act, the Secretary can provide for a exception or adjustment to the hospital's ceiling in such circumstances. Section 413.40(f) of the regulations implement section 1886(b)(4) of the Act regarding exemptions, adjustments and exceptions to the target rate of increase limit. The regulations provide that HCFA may adjust a hospital's operating costs considered in establishing cost per case, including both periods subject to the limit and the hospital's base periods, to take into account—

- Unusual costs due to extraordinary circumstances beyond the provider's control;
- Distortions in costs caused by a change in case mix as a result of the addition or discontinuation of services; or
- Factors such as a change in the inpatient hospital services that a hospital provides that could result in a significant distortion in the operating costs of inpatient hospital services. The adjustment may be made only if the hospital exceeds its limit for the cost reporting period and only to the extent the hospital's costs are reasonable, attributable to circumstances specified above, and verified by the intermediary.

The exceptions or adjustments we make to a hospital's target rate limit are most commonly for a particular problem in one cost reporting period, such as a hospital experiencing an increase in its Medicare average length of stay. This increase could cause a distortion in the comparison to its base year since the limit is calculated on a per discharge basis. If a hospital whose costs exceed the limit demonstrates that its increased costs are attributable to an average length of stay increase and that its costs are reasonable, we adjust the limit to recognize the increase in average length of stay over the base period.

In some situations, a permanent adjustment is made to a hospital's limit such as when a hospital adds a new and substantially different service. Such an addition would create the need for additional staff and also could result in treating a different kind of patient. However, only those costs associated with the addition of a new service would be included in the permanent adjustment made to the provider's rate-of-increase limit.

2. Assignment of a New Base Period

Section 6015(a) of Public Law 101–239 gives the Secretary authority to assign a new base period to a hospital if it is more representative of the reasonable and necessary costs of its inpatient services. We would authorize the assignment of a new base period only under limited circumstances and only when an adjustment cannot be accomplished through other provisions as discussed above. In order to justify the assignment of a new base period, a hospital must have a permanent, substantial, and significant change in the nature of services provided that results in costs exceeding its rate-of-increase. An example of such a change would be a psychiatric institution that previously had only provided limited care to its patient population and then had changed the entire focus of its work to providing a comprehensive range of psychiatric services to its patients.

However, should a hospital experience a significant change in patient care services and its costs exceed the target rate-of-increase limit, the remedy will not automatically be the assignment of a new base period. A general increase in costs beyond the limit is not grounds for rebasing. As discussed above, if a hospital adds a new service that results in increased costs, a permanent adjustment may be made to the hospital's limit to alleviate the distortion created by the new service and total rebasing would not be warranted.

Another situation that could occur is that the hospital may have significantly changed its patient care services but all the costs incurred above the ceiling may not be reasonable and necessary. One area we give particular attention to in this respect is indirect patient costs, (for example, administrative and general costs, and operation of plant.) The increase in indirect costs are often the result of factors unrelated to patient services and therefore, are not included in any adjustments and would not be included if the assignment of a new base period were approved. Rather, we expect cases of this nature to result in a rebasing of direct patient care costs only.

F. Payment for Hemophilia Inpatients

Hemophilia, a blood disorder characterized by prolonged coagulation time, is caused by an inherited deficiency of a factor in plasma necessary for blood to clot. The discovery in 1964 of a cryoprecipitate rich in antihemophilic factor activity facilitated management of acute bleeding episodes. For purposes of this final rule, hemophilia is considered to encompass the following conditions: Factor VIII deficiency (classical hemophilia); Factor IX deficiency (also termed plasma thromboplastin component (PTC) or Christmas factor deficiency); and Von Willebrand's disease. The most common factors required by hemophiliacs to increase coagulation are Factor VIII and Factor IX; a small number of hemophiliacs have developed inhibitors to these factors and require special treatment.

The basis for therapy of bleeding episodes is transfusion of material containing sufficient factor to temporarily correct the specific defect. Whole blood is not used for this purpose; its use is restricted to restoration of blood volume following severe loss. Plasma with a high content of factor may be used but factor concentrates are the preferred method of treatment since the content of factor is known and the load on the blood volume is less. The widespread use of clotting factor concentrates has been associated with more frequent emergence of abnormalities in liver function test results and the transmission of hepatitis viruses to some persons with hemophilia. Manufacturers of the clotting factors continually pursue development of methods for purification in an attempt to decrease the risks associated with their use. The emergence of acquired immunodeficiency syndrome (AIDS) has added impetus to the development of new and safer methods of producing clotting factors. Efforts to maintain a safe blood supply have resulted in increased efforts to improve purification of coagulation factors.

A variety of methods currently exist to reduce and inactivate viruses in coagulation concentrates, and multiple variations exist within each category. Dry heating, pasteurization, suspension heating, vapor heating, use of solvent detergent, and monoclonal antibody purification are among the methods currently being used for viral inactivation.

With the new developments in viral inactivation and the production of purified clotting factors, there has also been a dramatic increase in the costs. Several factors have contributed to this increase. The industry has committed significant resources in research and development to perfect the purification process and assure a safe supply of coagulation factor. Changes in production processes resulting from new technology have significantly reduced the yield of coagulation factors from the donor pool; thus, more plasma is required to produce one unit of coagulation factor. Periodic shortages have also contributed to price increases. Rapidly changing new technologies resulting in new products entering the market have functioned to enhance treatment efficacy at an increased cost.

The Prospective Payment Commission (ProPAC) recently completed a study entitled "The Adequacy of Prospective Payment for Medicare Beneficiaries with Hemophilia." ProPAC determined that hemophilia patients were distributed across several diagnostic-related groups (DRGs) and that patients with hemophilia had higher inpatient operating costs than other patients. However, while payments under the prospective payment system for these cases were slightly higher, the relative payment to cost ratios were lower. On October 2, 1989, ProPAC recommended to Congress implementation of a prospectively determined add-on payment for patients requiring the clotting factor, and that this payment should be determined on a per unit basis, based on a weighted average of the types of clotting factor available.

In response to ProPAC's recommendations and growing concern about increasing hospital costs for treating hemophiliacs, Congress enacted section 6011 of Public Law 101-239. That section amended section 1886(a)(4) of the Act to provide that prospective payment hospitals receive an additional payment for the costs of administering blood clotting factor to hemophiliacs who are hospital inpatients. The payment is to be based on a predetermined price per unit of the clotting factor multiplied by the number of units provided. Under section 6011 of Public Law 101-239, this add-on payment is effective for blood clotting factor furnished on or after June 19, 1990 and before December 19, 1991. In addition, section 6011 of Public Law 101-239, requires HCFA and ProPAC to develop and submit to Congress recommendations on how to pay for blood clotting factor. These recommendations are due not later than June 19, 1991.

We are establishing a price per unit of clotting factor based on the latest (1990) price listing available from the Drug Topics Red Book, the publication of pharmaceutical average wholesale prices. Although ProPAC recommended that we set an add-on payment amount for clotting factor based on a weighted average of the types of clotting factor available, we believe that it is more appropriate to set three separate add-on amounts, one for each of the three basic types of clotting factor. A comparison of the wholesale prices for the different types of clotting factor (that is, Factor VIII, Factor IX, and the other factors which are given to those patients with inhibiters to Factors VIII and IX (designated as Anti-inhibitors in this document)) reveals great variations among the three types. The Factor IX products are priced much lower than the Factor VIII products, and the special anti-inhibitor factors are priced higher than both of the other factors. Therefore, we believe that it would be more equitable to set an add-on payment amount for each type of blood clotting factor.

The add-on payment amount for each of the three types of factor is based on the median average wholesale price of the several products available in that category of factor. However, since we are aware that hospitals are generally able to negotiate direct selling prices with the various drug companies that are lower than the wholesale prices listed in the Drug Topics Red Book, we have discounted the average wholesale prices by 15 percent before calculating the median price. This 15 percent discount is based on the results of a study conducted by the Department's Office of Inspector General (OIG) entitled "Use of Average Wholesale Prices in Reimbursing Pharmacies Participating in Medicaid and the Medicare Prescription Drug Program" (Report No. A-06-89-00037, October 3, 1989). The OIG determined that the average wholesale price of a drug is heavily discounted in direct sales and that current data show that this discount averages 15.5 percent. In addition, the OIG report states that the average wholesale price is not a meaningful payment level, and it should not be used for making payment for drugs under Medicare.

The add-on payment amounts we have established for the three types of blood clotting factor are as follows:

Factor VIII—$.64 per unit
Factor IX—$.26 per unit
Other Hemophilia Clotting Factors (for example, Anti-inhibitors)—$1.00 per unit

Based on information from industry representatives, we believe that the clotting factors are generally available to hospitals or at below these prices.

We recognize that the products available, and their costs, are changing rapidly, with new products entering the market and existing products being discontinued. Since the market share of various products can shift dramatically within a short period of time, we believe the median price is preferable to a weighted average. We note, for example, several of the factor VIII products priced in ProPAC's report have been discontinued. In addition, we recognize that changes in the clotting factor market may require re-evaluation of the add on payment amount before the final rule setting forth the FY 1991 prospective payment rates is issued.

In setting the add-on payment amount, we considered whether other costs associated with the administration of hemophilia clotting factor should be

taken into account. Although section 1886(a)(4) of the Act refers to a payment for the costs of administering the clotting factor, there is nothing in the legislative history or the ProPAC recommendation to suggest that Congress intended that the payment cover more than the actual cost of the clotting factor. Other costs associated with the administration of the clotting factor, such as needles and intravenous (IV) tubing, are neither unique to the hemophilia inpatient nor unusually costly. Therefore, we have based the add-on payment amount on the cost of the clotting factor only.

To identify these factors, specific codes have been developed that will identify the three types and will be included in the bill submitted by the hospital.

Instructions will be issued to Medicare hospitals explaining the codes and how to use them. These codes will serve to identify the cases requiring payment for the clotting factor and will also permit the accumulation of data over time. The data will be evaluated in determining future payment alternatives.

Since we currently have no data concerning the administration of clotting factor under the prospective payment system, that is, in which DRGs clotting factor is most often provided to Medicare beneficiaries and in what volume, we are unable at this time to adjust the DRG weights to account for the payment of clotting factor as an add-on amount. In calculating DRG relative weights, it has been our policy to remove from the total charges of any case those charges that are paid for as an add-on amount, that is, paid for on a basis other than DRG payment. For example, since heart and kidney acquisition costs are paid on a reasonable cost basis, the acquisition charges are removed prior to computing the average charge for each DRG. Although we will consider a similar policy for the clotting factor add-on amount when we have accumulated the relevant data, we note that total payments will be relatively minor. ProPAC estimated that approximately 8 million units of clotting factor are administered to Medicare hospital inpatients annually.

G. Recognition of Nursing School Costs

1. Background

Medicare has historically paid a share of the net cost of approved medical education activities. Regulations concerning Medicare payment for nursing and allied health science educational costs are located at §§ 412.113(b) and 413.85. Section 413.85(b) defines approved educational activities as formally organized or planned programs of study usually engaged in by providers in order to enhance the quality of patient care in an institution. Under § 413.85(e), approved medical education activities include training programs for nurses.

Section 413.85(a) specifies that the allowable cost of approved educational activities is the net cost, which is determined by deducting tuition revenues from total costs. The net costs incurred for classroom and clinical training in an approved nursing education program operated by the provider are included within the definition of allowable medical education costs. Under sections 1886 (a)(4) and (d)(1)(A) of the Act and § 412.113(b) of the regulations, the costs of approved medical education activities are excluded from the definition of operating costs and, in the case of approved nursing education programs operated by the provider, are paid on a reasonable cost basis.

Some hospitals support approved nursing education programs operated by another institution, such as a nearby college or university. When a program is operated by another institution, the classroom training generally takes place in the nonhospital setting and the majority of the costs of the program are borne by the other institution and not by the hospital. Although the hospital may incur some costs associated with its provision of clinical training to students enrolled in a nearby institution, the hospital also gains in return in the quality of patient care. Since we do not believe that this type of relationship was what Congress intended when it provided for the costs of approved medical education programs to be paid on a reasonable cost basis, § 413.85 excludes costs incurred for nonprovider-operated programs from the definition of the approved medical education activities. The costs incurred by a hospital to support a nonprovider-operated nursing education program, to the extent they are allowable, are considered normal operating costs and are included in the DRG payment for inpatient services and are paid on a reasonable cost basis for outpatient services.

The allowable costs of nonprovider-operated nursing education programs are defined in chapter 4 of the Provider Reimbursement Manual (HCFA Pub. 15-1). Under our current policy, costs incurred by the hospital for clinical training at the hospital that relate to care of the hospital's patients are allowable. In cases in which classroom training occurs at the hospital, costs incurred by the hospital are allowable if—

- The hospital's support does not constitute a redistribution of nonprovider costs to the hospital;
- The hospital is receiving a benefit for the support it furnishes; and
- The hospital's support is less than the cost the hospital would be expected to incur with a program of its own.

2. Section 6205 of Public Law 101-239.

Section 6205(a) of Public Law 101-239 created a new temporary category of "hospital-based nursing schools" in addition to those recognized under §§ 412.113(b) and 413.85. Costs incurred by hospitals for training nursing students enrolled in these schools are to be paid on the basis of reasonable cost as though the hospital met the criteria at § 413.85. As specified in section 6205(a)(1)(A) of Public Law 101-239, costs incurred by a "hospital-based nursing school" will qualify under this provision—

> * * * if, before June 15, 1989, and thereafter, the hospital demonstrates that for each year, it incurs at least 50 percent of the costs of training nursing students at such school, the nursing school and the hospital share some common board members, and all instruction is provided at the hospital or, if in another building, a building on the immediate grounds of the hospital.

To meet the first criterion, the hospital must incur at least 50 percent of the total costs, that is, the costs before deduction of tuition revenues, incurred for classroom and clinical training provided to students enrolled in an approved nursing education program at the hospital-based nursing school. This would include programs in both professional and practical nursing that are approved by the appropriate approving body under § 413.85(e). We note that approved allied health science education programs are not included in this provision. Moreover, a hospital will not be considered to be incurring costs through payments to an educational institution for training of students.

Neither section 6205 of Public Law 101-239 nor the Committee Report (H.R. Rep. No. 386, 101st Cong., 1st Sess. (1989)) that accompanied Public Law 101-239 elaborates on the second criterion, that the nursing school and the hospital share some common board members. We will consider this requirement to be met if at least 50 percent of the board with fewer members (either the hospital or the nursing school) are also members of the board of the other entity, regardless of the number of members of the larger board.

The third criterion, that all instruction be provided at, or on the immediate grounds of, the hospital is clarified in the Conference Committee Report (H.R. Rep. No. 386, 101st Cong., 1st Sess. 869 (1989)). The report states that a program complies with this requirement "* * * only if this instruction occurs on the hospital campus, *not on the campus of an institution with which the hospital is affiliated.*" (Emphasis added.) In instances where the hospital is contiguous to, or within, the campus of an educational institution, this criterion will be considered to be met only if the instruction is provided at the hospital.

Section 6205(b)(2)(A) of Public Law 101–239 requires that the Secretary issued proposed regulations before July 1, 1990 that specify—

- The relationship required between an approved nursing education or allied health education program and a hospital for the program's costs to be attributed to the hospital;
- The types of costs related to nursing or allied health education programs;
- The distinction between costs of approved educational activities paid on the basis of reasonable cost and educational costs treated as operating costs of inpatient hospital services; and
- The treatment of other funding sources for the program.

Section 6205(b)(2)(B) of Public Law 101–239 provides that the final rule will not be effective before October 1, 1990, or 30 days after publication of the final rule in the **Federal Register**, whichever is later.

In addition, section 6205(b)(2)(A) of Public Law 101–239 provides that during the period after December 18, 1989 and before October 1, 1990, there is to be no recoupment of overpayments attributable to nursing and allied health science costs that have been reported as allowable medical education costs payable on a reasonable cost basis and later have been determined to not meet the definition of these costs. We are issuing program instructions to our intermediaries to implement this provision.

Section 6205(a)(2) Public Law 101–239 states that the new "hospital-based nursing school" provision applies to cost reporting periods beginning on and after enactment and "* * * on or before the date on which the Secretary issues regulations pursuant to subsection (b)(2)(A) [section 6205(b)(2)(A) of Pub. L. 101–239]." In citing section 6205(b)(2)(A), section 6205(a)(2) of Public Law 101–239 presents us with a logical inconsistency. Subparagraphs (A) and (B) of section 6205(b)(2), taken together, make it clear that the regulations referred to in section 6205(b)(2)(A) are proposed regulations, to be issued before July 1, 1990, and to be followed by a 60-day comment period. The final regulations (to which, it is assumed, the term "regulations" in section 6205(a)(2) of Public Law 101–239 refers) are to be effective no earlier than October 1, 1990. In light of the common understanding of the term "regulations", the temporary category of "hospital-based nursing schools" will expire with a hospital's first cost reporting period beginning on or after the date the final regulations required by section 6205(b)(2)(B)(iii) of Public Law 101–239 are issued.

Given the temporary and limited applicability of section 6205(a) of Public Law 101–239, we do not intend to amend the codified regulations to reflect the implementation of the policies explained above.

III. Temporary Elimination of the Day Limitation on Inpatient Hospital Services

A. Background

1. Medicare Catastrophic Coverage Act of 1988

After publication of a May 27, 1988 proposed rule concerning changes to the inpatient hospital prospective payment system and FY 1989 rates, on July 1, 1988, Public Law 100–360 was enacted. Under section 101(2) of Public Law 100–360, essentially unlimited inpatient hospital days were made available for Medicare beneficiaries (except for the inpatient psychiatric day limitation) effective for services furnished on or after January 1, 1989. Before enactment of Public Law 100–360, a beneficiary was entitled to 90 days of inpatient hospital services during each spell of illness. In addition, a beneficiary could draw from a lifetime reserve of 60 days if that beneficiary's inpatient hospital days exceeded 90 days in a spell of illness. Under that system, a hospital could bill the beneficiary or the beneficiary's third party insurer for inpatient hospital services furnished to a beneficiary whose inpatient hospital benefits were exhausted either before entering the hospital or, following admission, during the outlier portion of an inpatient stay (see 42 CFR 412.42(e)).

Hospitals and hospital associations expressed concern to Congress that they would be financially disadvantaged by not being permitted to bill beneficiaries on their third party insurers for inpatient hospital services that, before enactment of Public Law 100–360, were not covered because beneficiaries had exhausted their inpatient hospital benefits. (These noncovered days were not reflected in the cost base used to establish the prospective payment rates and thus are not recognized in those rates.) Therefore Public Law 100–360 required the Secretary to take into consideration reductions in payments by Medicare beneficiaries to prospective payment hospitals due to the elimination of a day limitation on inpatient hospital services caused by the provisions of section 101 of Public Law 100–360 when establishing the prospective payment rates, outlier thresholds, and diagnosis related group (DRG) weighting factors for FY 1989. In addition, section 104(c)(2) of Public Law 100–360 required the Secretary, when increasing the target amounts for hospitals excluded from the prospective payment system, to take into consideration on a hospital-specific basis, the same reduction in payments to excluded hospitals for cost reporting periods beginning on or after October 1, 1988.

2. The September 30, 1988 Final Rule

On September 30, 1988, we published the final rule (53 FR 38476) on changes to the inpatient hospital prospective payment system and FY 1989 rates. In that rule, we implemented two provisions of Public Law 100–360, which are discussed below, and we requested public comment on those changes.

3. The Family Support Act of 1988

Subsequent to the publication of the September 30 final rule, the Family Support Act of 1988 (Public Law 100–485) was enacted on October 13, 1988. Section 608(d) of Public Law 100–485 made several technical corrections to Public Law 100–360, including the following changes concerning provisions of Public Law 100–360 implemented in the September 30 final rule:

- Section 608(d)(3)(D) of Public Law 100–485 revised section 104(c)(2) of Public Law 100–360 to change the date for implementing the target rate adjustments from cost reporting periods that begin on or after October 1, 1988 to portions of cost reporting periods occurring on or after January 1, 1989.
- Section 608(d)(3)(E) of Public Law 100–485 revised section 104(c)(2) of Public Law 100–360 to specifically provide that an adjustment for any distortion due to higher costs caused by the expansion of inpatient hospital benefits is to be made whether or not a hospital or unit actually exceeded its target rate.

4. The Medicare Catastrophic Coverage Repeal Act of 1989

The Medicare Catastrophic Coverage Repeal Act (Public Law 101–234) was enacted on December 13, 1989. Under section 101(c) of Public Law 101–234,

any adjustment in payments to hospitals under the prospective payment system as provided for in section 104(c)(1) of Public Law 100–360 ended effective with discharges occurring on or after January 1, 1990. Under section 101(c)(2)(A)(i) of Public Law 101–234, the adjustment to the target rates for hospitals excluded from the prospective payment system, as provided for in section 104(c)(2) of Public Law 100–360, was eliminated effective with portions of cost reporting periods occurring on or after January 1, 1990. In addition, section 101(c)(2)(A)(ii) of Public Law 101–234 added clarification that in making any adjustment under section 104(c)(2) of Public Law 100–360, the adjustments to hospital target rates must be made disregarding whether a beneficiary had exhausted his or her Medicare benefits prior to January 1, 1989.

B. Hospitals Subject to the Prospective Payment System

Section 104(c)(1) of Public Law 100–360, as amended by section 101(c) of Public Law 101–234, requires the Secretary to take into consideration reductions in payments by Medicare beneficiaries to prospective payment hospitals due to the elimination of a day limitation on inpatient hospital services caused by the provisions of section 101 of Public Law 100–360 in establishing the prospective payment rates, outlier thresholds, and DRG weighting factors for discharges occurring on or after October 1, 1988 and before January 1, 1990.

In the September 30, 1988 final rule, we stated that we had determined that the prospective payment system would automatically adjust to the expansion of inpatient hospital benefits under Public Law 100–360 (53 FR 38519). This is because increased payments would occur automatically as DRG payments are made for entire stays, including the outlier portions thereof, that previously would not have been covered due to a beneficiary's exhaustion of covered inpatient hospital days. Aggregate payments to hospitals would automatically reflect changes in the volume of Medicare discharges resulting from the elimination of the day limitation on inpatient hospital benefits. The additional discharges occurring as a result of the expansion of benefits would be covered and paid for automatically as are all other discharges under the prospective payment system. Hence, we determined that no adjustment to the standardized payment amounts was necessary to accommodate the additional discharges for Medicare beneficiaries who prior to Public Law 100–360 would have been financially liable for such care because they had exhausted their Medicare inpatient hospital benefits prior to admission.

On the other hand, we indicated there would be additional days of inpatient care (those occurring during the outlier portion of a hospital stay) for which benefits were exhausted and the hospital would previously have been permitted to bill beneficiaries. This care was not reflected in the data base used to establish the prospective payment rates. Because these inpatient days would, in general, be covered after January 1, 1989, we analyzed whether it was necessary to make an adjustment to the prospective payment system in order to ensure that such care is financed out of additional Federal monies rather than through the updated standardized amounts and outlier funds.

We analyzed FY 1987 data regarding noncovered days of hospital care furnished under the existing benefit structure. Most of these noncovered days would have been covered under Public Law 100–360, and in some cases would have constituted covered outlier days. We estimated that outlier payments for such days would be about one percent of total DRG payments. However, to reflect these additional payments by increasing the standardized amounts by one percent would have required that the outlier offsets to those rates or the outlier thresholds be increased to ensure that total outlier payments were between five and six percent of total DRG payments and did not exceed the outlier offset. Moreover, our September 1988 estimate was overstated to the extent that some proportion of hospital days continued to be noncovered even after implementation of Public Law 100–360 (for example, medically unnecessary days). Therefore, we determined that for October 1, 1988 it was inappropriate to incorporate an adjustment into the rates.

Instead, we estimated outlier payments and outlier offsets on the basis of days covered under the inpatient benefit structure as reflected in the FY 1987 MEDPAR data base, knowing that the proportion of days eligible for outlier payments would increase as expanded coverage began on January 1, 1989 and that a higher proportion of DRG payments would thus be attributable to outlier payments as a result of such expansion of benefits.

In light of the increases in the outlier thresholds that were already necessitated by the changes in outlier payment policy for FY 1989 described in detail in the September 30, 1988 final rule (53 FR 38502), we indicated in that rule that the latter approach was appropriate for FY 1989 and preferable to further possible increases in the outlier thresholds. Accordingly, while the outlier *offsets* to the standardized amounts averaged 5.1 percent for FY 1989, [1] we expected that outlier *payments* would comprise about 6.1 percent of total DRG payments during that same year. These larger than estimated outlier payments in effect constituted our FY 1989 adjustment to account for the reductions in beneficiary payments to prospective payment hospitals owing to the elimination of the day limitation on inpatient hospital services provided for in section 101 of Public Law 100–360. We used the same methodology to adjust for the effects of catastrophic coverage in the FY 1990 payments (54 FR 36499).

The adjustments described above eliminated the need to increase the prospective payment rates to account for catastrophic coverage. Moreover, the DRG relative weights are already based on the average total charges, rather than average covered charges, for all cases in each DRG. Consequently, the weighting factors established in accordance with the methodology described at 53 FR 38492 and 54 FR 36468 contained no distortions resulting from the potentially different incidence across DRGs of inpatient hospital care furnished to beneficiaries who have exhausted their inpatient hospital benefits. Hence, no adjustment to the relative weights was needed to take into account the elimination of the day limitation on inpatient hospital care resulting from implementation of Public Law 100–360.

C. Excluded Hospitals and Units

We provided in the September 30, 1988 final rule that hospitals and hospital units excluded from the prospective payment system may apply for increases to their target rates to correct any distortion due to higher costs caused by the expansion of inpatient hospital benefits due to the provisions of section 101 of Public Law 100–360. We provided for the adjustment under section 104(c)(2) of Public Law 100–360 to be available to any hospital that experiences a distortion due to increased costs caused by elimination of the inpatient coverage limitation, whether or not the hospital actually exceeds its target rate. This is because any distortion would be due to the effect

[1] Although we accurately stated at 53 FR 38505 that we are maintaining "the outlier pool at 5.1 percent", we inadvertently asserted at 53 FR 38520 that "the outlier offsets to the standardized amounts average 5.2 percent for FY 1989".

of section 101 of Public Law 100–360 and would be essentially unrelated to the actions of any individual hospital—it is a circumstance that could potentially affect all hospitals to some degree.

We provided that a hospital may request a target amount adjustment directly from its intermediary. The target amount would be adjusted for the impact of any reduction in Medicare payments that the hospital experienced because of the previous inpatient day benefit limitation. The adjustment would be based on the estimated incremental costs of care historically furnished to Medicare beneficiaries after they had exhausted benefits during an inpatient stay.

We provided that a hospital may request an adjustment from its intermediary after the effective date of the September 30 final rule (that is, October 1, 1988) but no later than 180 days after the closing date of the hospital's first cost reporting period beginning on or after October 1, 1988. In order for its request to be considered, we provided that a hospital must submit a written request for an adjustment to its target amount under authority of this provision along with the following supporting documentation:

- A statement from the hospital stating whether the adjustment is to be based on its historical experience in its base period or its last cost reporting period beginning before October 1, 1988. (If this period is not of at least 12 months in duration, multiple consecutive cost reporting periods comprising at least 12 months must be used.)
- The hospital's cost report or reports for the period selected by the hospital to serve as the basis for the adjustment.
- Billing data for the period that serves as the basis for the adjustment documenting the following:

—The number of hospital inpatient days furnished to Medicare beneficiaries for which no payment was made because the beneficiary had exhausted part A hospital benefits. (Excluded from the count are days for stays that were not covered in their entirety, since such stays will be paid as discharges after January 1, 1989.)

—The ancillary charges for services furnished on the days after the beneficiary had exhausted part A hospital benefits, as counted above.

Upon receipt of a request for an adjustment by a hospital that includes the required information, the intermediary will verify the data submitted by the hospital regarding beneficiary status and exhaustion of inpatient hospital entitlement. (Medical necessity of acute care for inpatient days following exhaustion of entitlement would be assumed.)

In order to adjust the target amount, the intermediary will—

- Estimate the total inpatient operating costs for services furnished to Medicare beneficiaries, including the costs of services furnished after a beneficiary had exhausted benefits;
- Take the ratio of the above-determined costs to the Medicare allowable inpatient operating costs for the period from which the hospital's data are derived; and
- Apply this ratio to the otherwise applicable target amount for cost reporting periods beginning on or after October 1, 1988.

We indicated that the intermediary will determine the amount of any appropriate adjustment and notify the hospital of its determination within 90 days of the date of receipt of the request.

We provided the following example to illustrate the target amount adjustment:

1. Medicare allowable inpatient operating costs in base year or last cost reporting period beginning before October 1, 1988	$600,000
2. Estimated routine costs of inpatient days furnished to Medicare beneficiaries after exhaustion of Part A hospital benefits: 50 days of care multiplied by $400 Medicare allowable inpatient operating cost per diem	$20,000
3. Estimated costs for ancillary services furnished after Medicare beneficiaries had exhausted Part A hospital benefits (estimated by applying departmental cost-to-charge ratios from the cost report to the ancillary charges)	$10,000
4. Incremental costs of care furnished to Medicare beneficiaries after exhaustion of Part A hospital benefits (Line 2 plus Line 3)	$30,000
5. Total inpatient operating costs for Medicare beneficiaries notwithstanding exhaustion of Part A hospital benefits (Line 1 plus Line 4)	$630,000
6. Ratio of total inpatient operating costs for Medicare beneficiaries to covered Medicare inpatient operating costs (Line 5 divided by Line 1)	1.05
7. Target amount applicable to cost reporting period beginning on or after October 1, 1988	$4,500.00
8. Adjusted target amount for cost reporting period beginning on or after October 1, 1988 (Line 6 multiplied by Line 7)	$4,725.00

D. Discussion of Public Comments Concerning the September 30, 1988 Final Rule

Six letters were received timely containing comments on the provisions in Public Law 100–360 that were included in the September 30, 1988 final rule, that is, the only provisions of the final rule that were subject to comment. Although we received additional comments concerning various other aspects of the prospective payment system, we are not responding to those comments in this document.

All of the commenters raised issues concerning Medicare compensation to hospitals for losses that may be suffered due to the elimination of the Medicare day benefit limitation. Two of the commenters discussed the methodology for compensating prospective payment hospitals; five of the commenters raised issues concerning the target rate adjustments for excluded hospitals and units. In general, the commenters supported our methodology to adjust target rates; however, several commenters suggested modifications to our methodology.

1. Hospitals Subject to the Prospective Payment System

Comment: Two commenters expressed general concern that increases in outlier payments may not adequately compensate hospitals for losses that they may incur due to the elimination of the day limitation on hospital benefits. These commenters were concerned that HCFA did not address the issue of future adjustments to the system to provide additional funds for catastrophic coverage That is, these commenters wanted to know whether HCFA planned to collect data on the additional covered days in order to make an adjustment to the standardized amounts or whether permanent changes to the outlier policy would be adopted. Both commenters stated that HCFA should clearly specify now how additional funds will be incorporated into total payments under the prospective payment system in the future. One commenter suggested that HCFA collect the necessary data to develop an appropriate adjustment and publish the methodology for, and results of, the calculation of the effects of catastrophic coverage on prospective payment hospitals.

Response: We recognize that the funding of additional covered days through outlier payments was a temporary measure and had intended to develop a permanent adjustment once we had actual data on the impact of catastrophic coverage. However, because catastrophic coverage was repealed effective January 1, 1990, a permanent adjustment to finance the additional covered days of care that are currently funded through outlier payments is no longer necessary

Further, we note that since the funding of the additional covered days through outlier payments did not affect the outlier thresholds or the outlier offsets to the standardized amounts, no changes are required in the FY 1990 outlier payments and outlier offsets to account for the repeal of catastrophic coverage.

2. Hospitals and Units Excluded From the Prospective Payment System

Comment: Several commenters pointed out that although the elimination of the hospital day benefit limitation on Medicare inpatient hospital services under section 101 of Public Law 100–360 became effective January 1, 1989, under the September 30, 1988 final rule, target amounts would be adjusted for cost reporting periods beginning on or after October 1, 1988, which would be before the implementation date of section 101 of Public Law 100–360. The commenters suggested that our implementation date be revised. Similarly, some commenters asked that we apply the adjustments to portions of cost reporting periods occurring after January 1, 1989, even if the fiscal year for the hospital began before the effective date of the law, in order to ensure that costs for current inpatient beneficiaries who had exhausted their Medicare coverage would be recognized timely.

Response: Section 104(c)(2) of Public Law 100–360 specified that adjustments for excluded hospitals and units would begin for cost reporting periods starting on or after October 1, 1988. The policy set forth in our September 30, 1988 final rule conformed with this provision. However, subsequently, section 608(d)(3)(D) of Public Law 100–485 revised the date for implementing the target rate adjustments from cost reporting periods that begin on or after October 1, 1988 to portions of cost reporting periods occurring on or after January 1, 1989. Additionally, section 101(c) of Public Law 101–234 limited the adjustment provisions of section 104(c)(2) of Public Law 100–360 to portions of cost reporting periods occurring before January 1, 1990. In this document, we are revising § 413.40(i) to clarify that target rate adjustments will be made for any portion of a cost reporting period occurring on or after January 1, 1989 and before January 1, 1990.

Comment: One commenter requested that instead of the option of using the last cost reporting period beginning before October 1, 1988 as the basis for the target rate adjustment, a hospital be allowed to use an earlier cost reporting period so that any increases would be available closer to January 1, 1989. That is, rather than allowing a hospital the option of using its last cost reporting period beginning before October 1988 to determine any adjustment under § 413.40(i) as provided in the September 30, 1988 final rule, a hospital should be given the option of using the last cost reporting period ending before January 1, 1989 (the effective date of the elimination of the hospital day benefit limit).

Response: Based on section 608(d)(3)(D) of Public Law 100–485, which amended section 104(c)(2) of Public Law 100–360 to change the effective date for providing a target rate adjustment from cost reporting periods beginning on or after October 1, 1988 to any portion of a cost reporting period occurring on or after January 1, 1989, we are revising § 413.40(i)(2)(i) to provide that the alternative to using an excluded hospital's base year data in making this target rate adjustment is using the hospital's last cost reporting period ending before January 1, 1989. We had proposed to use the most recent cost reporting period data which began before October 1, 1988 for making the target rate adjustment as an option to using the hospital's base-year data to ensure that necessary data would be readily available. However, we agree that this slightly earlier cost reporting period should not present much more of a problem with respect to the ready availability of cost and day information needed by the intermediary.

Comment: One commenter expressed concern that only billed charges for ancillary services are to be used to determine ancillary costs for services furnished on the days after the beneficiary had exhausted inpatient hospital benefits in making the target amount adjustment. The commenter pointed out that in some cases hospitals will not have these data readily available and that in other cases billed ancillary charges will not even be obtainable, for example, in a no-charge, all-inclusive rate hospital or in a hospital that is paid on an average per diem rate under a State Medicaid program for care furnished to a Medicaid recipient. The commenter suggested that in addition to billed charges for ancillary services, actual cost data and average cost per diem be used in making the calculation for the target rate adjustment.

Response: We have revised § 413.40(i)(2)(iii) so that a hospital that is unable to document its actual ancillary charges, including a no-charge structure and an all-inclusive-rate hospital, may use an average cost per diem for ancillary services in lieu of estimating ancillary costs by applying departmental cost-to-charge ratios from the cost report to ancillary charges. We recognize that limiting the methodology to billed charges could be impossible in certain cases and could represent an unnecessary evidential burden in others. We believe intermediaries have adequate working relationships with the affected hospitals to ensure that reasonable determinations of ancillary costs will result.

Comment: Two commenters asked that we clarify the treatment of inpatient days for a Medicare beneficiary who was treated in the year used for the adjustment calculation and had exhausted his or her inpatient benefits before being admitted to an excluded hospital or unit.

Response: Section 101(c)(2)(A)(ii) of Public Law 101–234 amended section 104(c)(2) of Public Law 100–360 to require that target rate adjustments be made without regard to whether a beneficiary had exhausted Medicare coverage prior to January 1, 1989. Beneficiaries who exhausted their benefits before January 1, 1989, and became re-entitled to benefits under catastrophic coverage fall into two categories: those who exhausted their benefits after admission to the hospital and those who exhausted their benefits prior to admission. To account for these beneficiaries in the adjustment of the target rate for the impact of catastrophic coverage, it is necessary only to increase the target rate for hospital inpatient days for a beneficiary who exhausted benefits after admission, including any beneficiary who exhausted his or her inpatient benefits prior to the beginning of the selected cost reporting period.

If the beneficiary was discharged during the selected cost reporting period, this discharge must also be added to the total number of Medicare discharges because this discharge would not have been recorded as a Medicare discharge during the selected cost reporting period. (A discharge would have been counted during the cost reporting period in which the beneficiary exhausted his or her Medicare benefits and changed payment status.) No discharge would be added for a beneficiary who exhausted his or her benefits in either the prior or selected cost reporting period but was not discharged until a subsequent cost reporting period.

However, hospital inpatient days furnished to Medicare beneficiaries for which no payment was made during the selected cost reporting period because the beneficiary had exhausted his or her

inpatient hospital benefits prior to admission are not taken into account in calculating the costs to be used in the target rate adjustment determination. The target rate is determined on a cost per case basis. We believe that on average the cost for beneficiaries who had exhausted benefits during their stays (for which the exhausted day benefits are recognized in the adjustment) should approximate the average cost per discharge for the patients admitted after all benefits were exhausted. Therefore, an explicit adjustment to the target rate is unnecessary.

Comment: One commenter noted that although we stated in the preamble of the September 30, 1988, final rule (53 FR 38521) that intermediaries will make the target rate adjustment determinations, we provided in the regulations at § 413.30(i)(1) for HCFA to make these determinations. The commenter suggested that § 413.40(i)(1) be clarified to provide that intermediaries would determine target rate adjustments rather than HCFA although HCFA makes other exception, exemption, and adjustment determinations. Another commenter recommended that we make it clear that HCFA, rather than the intermediaries, should make the target rate adjustment determinations.

Response: We concur with the first commenter's suggestion and have revised § 413.40(i)(1) to indicate that the intermediaries will make these target rate determinations. This clarification will eliminate confusion concerning in which circumstances HCFA reserves its authority to make determinations.

Comment: One commenter suggested that we send notification and instructions to all excluded hospitals about the adjustment for higher costs caused by the expansion of inpatient hospital benefits, treat the applications expeditiously, provide for timely appeals, and advise hospitals that exceptions for case-mix changes are not precluded by this adjustment.

Response: We believe the changes at § 413.40(i) include adequate instructions and, further, will not confuse hospitals into thinking that this adjustment would prevent them from seeking any other applicable exception or adjustment, such as an exception for case-mix changes. This target rate adjustment procedure is clearly in addition to the other exceptions and adjustments provided in § 413.40 (g) and (h).

With respect to expeditious processing of applications for and appeals of these adjustments under § 413.40(i), we believe that the requirement in the preamble of the September 30, 1988 final rule (53 FR 38521) for the intermediary to make a determination on a request for a target rate adjustment and notify the hospital within 90 days of the date of receipt of the request assures timely processing. Further, we note that we issued a Program Memorandum (A–89–4) in July 1989 authorizing intermediaries to make an interim adjustment to a provider's target rate for purposes of adjusting interim payments. Finally, due to the relatively objective nature of the basis for this particular adjustment and an intermediary's extensive working relationship with most of the affected hospitals, we expect that appeals in those cases will be rare and that the standard appeals mechanisms provided by the regulations in subpart R of part 405 (§§ 405.1801 through 405.1889) are adequate to deal with these cases.

Comment: Several commenters suggested that the regulations added at § 413.40(i) because of Public Law 100–360 also provide HCFA with the authority to make target rate adjustments for changes in case mix, average length of stay, changing admission patterns, changes in professional review standards, inappropriate base-year factors, and a variety of other reasons that may be beyond the control of the hospital. Some commenters also suggested that these additional adjustments should be made automatically whether or not the hospital had exceeded its target rate.

Response: As we pointed out in the September 30, 1988 final rule (53 FR 38520), making a target rate adjustment to correct any distortion due to higher costs caused by the expansion of inpatient hospital benefits is an exception to our general rule that an excluded hospital or unit may not receive a target rate exception or adjustment unless the hospital or unit actually exceeded its target rate. Subsequently, section 608(d)(3)(E) of Public Law 100–485 revised section 104(c)(2) of Public Law 100–360 to specifically provide that an adjustment for any distortion due to higher costs caused by the expansion of inpatient hospital benefits is to be made whether or not a hospital or unit actually exceeded its target rate.

All other bases for exceptions and adjustments are subject to the provisions of the regulations at § 413.40(g) for exceptions and § 413.40(h) for adjustments. Under both paragraphs, HCFA may adjust a hospital's operating costs "only if a hospital's operating costs exceed the rate of increase ceiling imposed under this section."

Under the provisions currently in effect, hospitals have requested exceptions and adjustments and some have been granted. We have also provided intermediaries with the authority to make future exceptions and adjustments in those individual cases with the same recurring circumstances. However, the provisions of Public Law 100–360 do not provide authority to provide any exception or adjustment other than one for a distortion due to higher costs caused by the expansion of inpatient hospital benefits unless a hospital or unit actually exceeded its target rate. Thus, we are not revising the standards or procedures for any other type of exception or adjustment request.

Comment: Another commenter suggested that a long-term care hospital should be exempted from the rate-of-increase ceiling altogether because Medicare beneficiaries constitute a larger portion of its total patient utilization than the patient utilization of other types of hospitals. Thus, unlike other types of hospitals, long-term care hospitals are unable to balance lower payments from Medicare with higher payments from other payors.

Response: We have no statutory authority to exempt an excluded hospital or unit from the rate-of-increase ceiling rules. Moreover, we do not agree with the underlying premise of the comment. Medicare payments to long-term care hospitals, as well as to other hospitals excluded from the prospective payment system, are based on the reasonable cost of providing services to Medicare beneficiaries. The ceiling on the rate of increase in operating costs per case ensures that Medicare payments are reasonable and, in the case of efficient hospitals, should not necessitate balancing Medicare payments with higher payments from other payors.

For the convenience of the reader, we are presenting a revised example to illustrate the target amount adjustment. This example takes into account the provisions of section 104(c)(2) of Public Law 100–360 as amended by section 608(d) of Public Law 100–485 and by sections 101 (c) and (d) of Public Law 101–234, and changes made because of public comment:

Step 1. Medicare allowable inpatient operating costs for covered days of care in base cost year or last reporting period ending before January 1, 1989—$600,000

Step 2. Number of Medicare discharges for the cost reporting period used in Step 1—300

Step 3. Average cost per discharge (Step 1 divided by Step 2)—$2,000

Step 4. Estimated costs for ancillary services furnished to Medicare beneficiaries after exhaustion of Part A hospital benefits. (If actual ancillary

charges are available, ancillary costs are estimated by applying departmental cost-to-charge ratios from the cost report to the ancillary charges. If actual ancillary charges cannot be retrieved from the hospital's system, an ancillary cost per diem may be used in completing this step.)—$10,000

Step 5. Extimated routine costs of Medicare inpatient days furnished to beneficiaries after exhaustion of Part A hospital benefits equals 50 days of care multiplied by $400 for the Medicare allowable inpatient operating cost per diem (obtained from the Medicare cost report). (All-inclusive-rate hospitals and no-charge-structure hospitals use total inpatient operating costs per diem (which equals Step 1 divided by total Medicare inpatient days))—$20,000

Step 6. Total inpatient operating costs for Medicare beneficiaries notwithstanding exhaustion of Part A hospital benefits (Step 1 plus sum of Step 4 and Step 5)—$630,000

Step 7. Number of Medicare discharges for beneficiaries who had exhausted Part A hospital benefits in a prior cost reporting period—10

Step 8. Total Medicare discharages notwithstanding exhaustion of Part A hospital benefits (Step 2 plus Step 7)—310

Step 9. Average cost per discharge notwithstanding exhaustion of Part A hospital benefits (Step 6 divided by Step 8)—$2,032

Step 10. Ratio of average cost per discharge notwithstanding exhaustion of Part A hospital benefits to average cost per discharge (Step 9 divided by Step 3)—1.016

Step 11. Updated target rate applicable to latest cost reporting period beginning before January 1, 1989—$2,438

Step 12. Adjusted target rate applicable to any portion of a cost reporting period occurring on or after January 1, 1989 and before January 1, 1990 (Step 10 multiplied by Step 11)—$2,477

Step 13. Updated target rate eliminating Catastrophic coverage adjustment for portions of cost reporting period occurring after January 1, 1990 (Step 11 multiplied by FY 1990 update factor (1.055))—$2,572

IV. Technical Corrections From the September 30, 1988 Final Rule

Because several editorial errors were made in the regulations text of the September 30, 1988 final rule, we are amending §§ 405.310, 412.64, 412.92(f)(1), 412.96(b)(1)(ii), and 413.40 to correct these errors as follows:

- In the title of § 405.310(m), we are removing the period after the word "inpatients".
- We are correcting the section designation "§ 412.64" to read "§ 412.63".
- In the first sentence of § 412.84(h), we are removing the word "annually". In the September 30 final rule, in response to a public comment (53 FR 6507), we indicated that, as cost reports are settled by the intermediaries, we are instructing the intermediaries to update the hospital-specific cost-to-charge ratios effective with discharges 30 days after the date of the Notice of Amount of Program Reimbursement. This means that in any given year a hospital's cost-to-charge ratio may be updated more than once or not at all based on the number of cost reports settled. Although we had changed our proposed policy in response to the public comment, we failed to make a corresponding change in the regulations text.
- In the first sentence of § 412.92(f)(1), we are removing the word "hospital's" after the word "its".
- We are correcting the number "25" to read "275" in § 412.96(b)(1)(ii).
- In the title of § 413.40(h)(1), we are correcting the title "Capability of cost reporting periods." to read "Comparability of cost reporting periods."

V. Regulatory Impact Analysis

A. Introduction

Executive Order (E.O.) 12291 requires us to prepare and publish a regulatory impact analysis for any final rule that meets one of the E.O. 12291 criteria for a "major rule;" that is, a rule that will be likely to result in—

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- A significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

In addition, we generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA)(5 U.S.C. 601 through 612), unless the Secretary certifies that a final rule will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we consider all hospitals to be small entities.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis for any final rule that may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the RFA. With the exception of hospitals located in certain rural counties adjacent to urban areas and hospitals located in certain New England counties, for purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital with fewer than 50 beds located outside of a Metropolitan Statistical Area or New England County Metropolitan Area. Section 1886(d)(8)(B) of the Act specifies that hospitals located in certain rural counties adjacent to one or more urban areas are deemed to be located in the adjacent urban area. We have identified 52 rural hospitals, some of which may be considered small, that we have reclassified as urban hospitals. Also, section 601(g) of the Social Security Amendments of 1983 (Pub. L. 98-21) designated hospitals in certain New England counties as belonging to the adjacent New England Metropolitan County. Thus, for purposes of the prospective payment system, we classified these hospitals as urban hospitals.

It is clear that the changes being implemented in this document will affect both a substantial number of small rural hospitals as well as other classes of hospitals, and the effects on some may be significant. Therefore, the discussion below, in combination with the rest of this final rule, constitutes a combined regulatory impact analysis and regulatory flexibility analysis in accordance with E.O. 12291 and the RFA.

B. Limitations of Our Analysis

As has been the case in previously published regulatory impact analyses, the following quantitative analysis is limited to presenting the projected effects of final policy and rate changes on current and projected payment rates. In the analysis that follows, we examined the effects of both statutory and final policy changes on hospital payments by projecting estimated payments under each set of policy changes onto the current payment amounts. That is, we projected the effects of each policy change on payments while holding all other payment variables constant. Thus, we are not attempting to predict behavioral responses to our policy changes, and we are not generally accounting for changes in such exogenous variables as admissions, lengths of stay, or case mix.

In view of the difficulty we have in quantifying impacts and attributing causality, we believe that the approach we are taking in the specific impact

discussions below is the most feasible one. Wherever possible, we have included quantitative representations of the changes being implemented in this final rule. As with previously published impact analyses, we are soliciting comments and information about the anticipated effects of these changes on the prospective payment system.

C. Hospitals Included In and Excluded From the Prospective Payment System

In general, hospitals began operating under the prospective payment system with the start of their cost reporting period beginning on or after October 1, 1983. Further, since September 1985, both Massachusetts and New York have terminated the waivers under which they were excluded from the Medicare prospective payment system, and hospitals in those States have entered the prospective payment system. (Massachusetts hospitals came under the Medicare prospective payment system in October 1985, while New York hospitals began receiving Medicare propsective payments in January 1986.) Effective January 1, 1989, the 94 short-term, acute care hospitals located in New Jersey came under the prospective payment system. The demonstration project being conducted in the Rochester region of New York State has ended and the 10 hospitals in that region are now under the prospective payment system.

With the enactment of section 9304 of the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509), which added section 1886(d)(9) to the Act, the 58 acute care hospitals located in Puerto Rico began receiving payments under the prospective payment system effective with discharges occurring on or after October 1, 1987. Also, effective with cost reporting periods that began on or after October 1, 1987, alcohol/drug hospitals and units that had been excluded from the prospective payment system under § 412.22(c) of the regulations began receiving Medicare prospective payments. Thus, only 59 short-term, acute care hospitals remain excluded from the prospective payment system under section 1814(b)(3) of the Act (in Maryland) or demonstration projects (in the Finger Lakes regions of New York State). As of March 1, 1990, about 5,560 hospitals (85 percent of all Medicare-participating hospitals) were operating under the prospective payment system.

As of March 1, 1990, almost 940 Medicare hospitals were excluded from the prospective payment system and continue to be paid on the basis of their reasonable cost, subject to limits on the rate of their cost increases. These hospitals include psychiatric, rehabilitation, long-term care, and children's hospitals. Another 1,720 psychiatric and rehabilitation units in hospitals subject to the prospective payment system are excluded from the prospective payment system as of the same date. These units, too, are paid on the basis of reasonable cost subject to limits on the rate of their cost increases. Although hospitals extensively involved either in the treatment of cancer or cancer research have been paid on a reasonable cost basis, section 6003(a) of Public Law 101–239 specifically excluded these hospitals from the prospective payment system effective with cost reporting periods beginning on or after October 1, 1989. There are currently eight hospitals that HCFA has designated as cancer research or treatment hospitals.

Over 1,160 hospitals are now paid on various special bases under the prospective payment system, as required by statute. They include sole community hospitals; Medicare-dependent, small rural hospitals; and rural referral centers. In addition, there are some 1,580 hospitals that are now receiving additional payments on the basis of being classified as disproportionate share hospitals.

About 30 of these hospitals also receive special payments as rural referral centers. About 1,190 hospitals are receiving additional payments for the indirect cost of medical education. There are about 610 hospitals that qualify for additional payments under both the indirect medical education and disproportionate share payment provisions.

D. Impact of Repealing the Medicare Catastrophic Coverage Act of 1988

As a result of the enactment of the Medicare Catastrophic Coverage Repeal Act of 1989 (Public Law 101–234), payment adjustments for hospitals and hospital units included and excluded from the prospective payment system that were authorized under sections 104 (c)(1) and (c)(2) of the Medicare Catastrophic Coverage Act of 1988 Public Law 100–360 have been repealed effective January 1, 1990.

The overall impact of section 101(a) of Public Law 100–360 was to permit beneficiaries to be treated for diseases or conditions requiring a covered level of hospital inpatient care without regard to the number of days of inpatient care. Thus, beneficiaries and other third party payers were relieved of the burden of paying for care once they had reached the former maximum number of hospital inpatient days allowed per spell of illness (90 days) or used up their lifetime reserve days (an additional 60 days).

Sections 104 (c)(1) and (c)(2) of Public Law 100–360 authorized the Secretary to adjust payments to both hospitals and hospital units included in and excluded from the prospective payment system. We implemented these provisions in the September 30, 1988 prospective payment system final rule (53 FR 38519). For hospitals and hospital units excluded from the prospective payment system, we revised § 413.40 to allow these hospitals and hospital units to receive an adjustment to their target rate based on the additional costs incurred in treating Medicare patients under the new catastrophic provisions. For hospitals paid under the prospective payment system, we maintained the outlier payment pool at the same percentage of total payments. This had the effect of using additional federal funds for day outliers to cover the costs of the additional days of hospital care allowed under the hospital catastrophic provisions.

The effect of repealing the inpatient hospital catastrohpic coverage provisions of Public Law 100–360 is to transfer back to beneficiaries or third party payers the obligation of paying for services once the 90 days allowed per spell of illness or the 60 lifetime reserve days are exhausted. The adjustment granted under § 413.40 is now withdrawn and excluded hospital and hospital unit target rates will be readjusted. Payments for day outliers to hospitals under the Medicare prospective payment system will automatically return to their previous levels. We are unable to assess the dollar impact of the repeal of the catastrophic provisions on excluded hospitals and hospital units because the requests for adjustments to the target rate were handled by each hospital's fiscal intermediary. The data to estimate the amount of the adjustments are for this reason not readily available. The repeal of the catastrophic provisions is estimated to reduce Medicare payments to prospective payment hospitals by approximately $1.3 billion in FY 1990. The hospitals will be able to charge the beneficiary or seek other third-party payment for the periods that will not be covered because of the reimposition of the benefit period limitations.

E. Impact on Excluded Hospitals and Units

As noted in the section C. of this impact analysis, almost 940 Medicare hospitals and 1,720 units in hospitals included in the prospective payment system currently are paid on a reasonable cost basis subject to the rate-of-increase ceiling requirement of

§ 413.40. Section 6015 of Public Law 101–239 amended the target rate adjustment authority contained in section 1886(b)(4) of the Act to provide that an excluded hospital or unit may, under certain conditions, be granted a new base year rather than an adjustment to the target rate already established. Thus, the assignment of a new base year period is another mechanism HCFA can now use, when appropriate, in determining the payment amount for an excluded hospital or unit that has exceeded its ceiling in a cost reporting period.

We expect that section 6015(a) of Public Law 101–239 that amended section 1886(b)(4) of the Act will have a minimal effect on hospitals and hospital units that are excluded from the prospective payment system. As described in section II.D.2. of this preamble, we anticipate the granting of a new hospital base year as a remedy for costs exceeding a hospital's target rate ceiling only under limited circumstances and only when other remedies provided for in our regulations will not suffice. We will grant the assignment of a new base year only when costs exceeding the hospital's ceiling were the result of permanent, substantial, and significant changes in patient services. Moreover, before we will assign a new base year, the hosptial will have to demonstrate the reasonableness of the costs associated with the change for which it was seeking a new base year.

Because we intend to assign a new base year only as a last resort, we anticipate that only a small proportion of the hospitals that apply for a new base year will be assigned one. Thus, while assignment of a new base year could represent a significant change in payments to those hospitals that are granted one, we expect the overall impact on payments to hospitals excluded from the prospective payment system to be very small.

F. Impact of Additional Payments for Hemophilia Clotting Factors

Based on a recommendation from the Prospective Payment Assessment Commission (ProPAC), section 6011(a) of Public Law 101–239 was enacted. That section amended section 1886(a)(4) of the Act to exclude the cost of hemophilia blood clotting factor from the definition of hospital inpatient operating cost. Section 6011(b) of Public Law 101–239 directs the Secretary to determine the amount of additional payments to be made to hospitals for blood clotting factor. As discussed in section II.F. of the preamble to this document, we have established prices for three clotting factors. They are as follows:

Factor VIII—$.64 per unit
Factor IX—$.26 per unit
All other Factors (Anti-inhibitors)—$1.00 per unit

In its report, ProPAC identified 2,239 Medicare hemophilia inpatient discharges in 1987 and 2,152 discharges in 1988. Applying the percentage of Medicare hemophilia inpatients to total hemophilia patients, ProPAC estimated that Medicare hemophilia inpatients utilized about 8 million units of clotting factor during the latest 12-month period for which data are available. Based on ProPAC's data, we expect the number of hemophilia discharges and the Medicare consumption of blood clotting factor to remain fairly constant over the next 2 years.

From discussions with industry representatives, we estimate that Factor VIII will account for 75 percent of the total blood clotting factor administered to Medicare hemophilia inpatients and that Factor IX and the Anti-inhibitors will constitute roughly equal shares of the other 25 percent. Based on these utilizations rates, we estimate the annual impact on the Medicare program will be additional payments of about $5.0 million.

While we are unable to determine the impact of the additional payments for the clotting factor on hospitals treating Medicare hemophilia inpatients, we believe they will adequately compensate hospitals for providing clotting factor to Medicare inpatients. Futhermore, the ProPAC report suggests that the overall impact will be minimal for most hospitals treating Medicare hemophilia patients. Of the almost 950 hospitals that treated Medicare hemophilia inpatients in 1987 and 1988, approximately 92 percent of these hospitals discharged between one and five Medicare hemophilia inpatients. Thus, for the majority of hospitals that treat Medicare hemophilia inpatients, the additional payments for hemophilia clotting factor should not make a significant difference in the total amount of payments these hospitals receive from Medicare.

G. Impact of New Provision Concerning Hospital-Based Nursing Schools

Section 6205(a)(2) of Public Law 101–239 establishes a new, temporary category of "hospital-based nursing schools." The criteria specified in the law for qualifying under this new category are—

- If before June 15, 1989, and for every year thereafter, the hospital incurred at least 50 percent of the costs of training nursing students at the school;
- The nursing school and hospital share some common board members; and
- All nursing instruction takes place at the hospital.

This category is to be effective for cost reporting periods beginning on or after the date of enactment of Public Law 101–239 (December 19, 1989) and expire with cost reporting periods beginning on or after the date the Secretary issues final regulations that specify—

- The relationship required between an approved nursing education or allied health education program and a hospital for the program's costs to be attributed to the hospital;
- The types of costs related to nursing or allied health education programs;
- The distinction between costs of approved educational activities paid on the basis of reasonable cost and educational costs treated as operating costs of inpatient hospital services; and
- The treatment of other funding sources for the program.

We cannot quantify the impact of these provisions. However, based on our experience in auditing hospital educational costs, we believe that only a very few hospitals will meet the criteria outlined in section 6205 of Public Law 101–239. Based on this perception of the number of hospitals affected by this provision, we expect the impact on the Medicare program to be minimal.

H. Quantitative Impact Analysis of the Final Policy Changes on Prospective Payment Hospitals

1. Basis and Methodology of Estimates

The data used in developing the following quantitative analysis of changes in payments, presented in Table I below, are taken from FY 1988 billing data and hospital-specific data for FY 1986 and FY 1987. As in previous analyses, we compared the effects of changes being implemented in this document to our estimate of the payment amounts under policies in effect on January 1, 1990.

In addition, we have treated all hospitals in our data base as if they have cost reporting periods that coincide with the Federal fiscal year. By establishing the same cost reporting period for all hospitals, we can show the effect of policy changes on payments for comparable 12-month periods. Treating all hospitals as though they had the same cost reporting period, however, will overstate the first year impact of those provisions applying to the

selection of payment rates for sole community hospitals and Medicare-dependent, small rural hospitals. Yet without assuming the same cost reporting period for all hospitals in our database, we could not display the full effects of these new payment provisions for sole community hospitals and Medicare-dependent, small rural hospitals. In actuality, these provisions will be phased in with cost reporting periods beginning on or after April 1, 1990, and, therefore, their full impact on hospital payments will not be felt until April 1, 1991.

Another element our analysis does not take into account is any behavioral changes hospitals may adopt in response to the policy changes being implemented in this final rule.

The tables and the discussion that follow reflect our best effort to identify and quantify the effects of the changes being implemented in this document. It should be noted, however, that as a result of gaps in our data, we are unable to quantify some of the effects of the changes contained in this rule. Also, we could not categorize all the hospitals in our data base because in some cases the hospital-specific data necessary for constructing our impact model were missing. For some hospitals data on hospital bed size and type of ownership were missing. The missing data, however, did not prevent us from using the discharges from these hospitals to estimate the actual payments for FY 1990 and the projected payments under the new policies that serve as the bases of our simulation.

The following analysis examines, in column 1 of Table I, the effect of the provisions granting alternative payment rates for sole community hospitals and Medicare-dependent, small rural hospitals. In column 2 of Table I, we show the effects of the changes in the qualifying criteria for disproportionate share hospitals and the changes in formulas for determining additional payments to these hospitals. That is, in columns 1 and 2, all variables except those associated with the provision under examination were held constant so as to display the effects of each provision compared to the baseline (January 1, 1990) provisions. In the last column (column 3), we present the combined effect of all changes being implemented in this final rule. That is, column 3 displays the combined effects of the previous two columns as well as changes in the wage index reflecting the enactment of section 6003(h) of Public Law 101-234 that amended section 1886(d)(8)(B) of the Act. As such, this last column is the only one in which the effects of all the quantifiable payment policy changes on simulated FY 1990 payments are reflected.

Consistent with the display of the impact presented in Table I below, the following discussion of the impact simulation results is divided into three parts. The first and second parts describe the effects of two major changes being implemented in this document. These are as follows:

- Alternative payment rates for sole community hospitals and Medicare-dependent, small rural hospitals as provided for in sections 1886(d)(5)(D) and (d)(5)(G) of the Act; and
- The changes to the qualifying criteria and payment formula for disproportionate share hospitals under section 1886(d)(5)(F) of the Act.

The third part discusses the combined effect of all provisions being implemented in this rule.

TABLE I.—IMPACT OF THE CHANGES BEING IMPLEMENTED EFFECTIVE APRIL 1, 1990

	Number of hospitals [1]	Column 1, Medicare dependent/ sole community hospitals [2]	Column 2, disproportionate share payments [3]	Column 3, all changes [4]
All Hospitals	5,688	0.3	0.6	0.8
Urban by Region:				
New England	182	0.0	0.3	0.3
Middle Atlantic	482	0.0	0.7	0.7
South Atlantic	444	0.1	0.6	0.7
East North Central	540	0.0	0.4	0.4
East South Central	179	0.0	0.6	0.6
West North Central	200	0.0	0.2	0.2
West South Central	374	0.0	0.9	0.8
Mountain	119	0.1	0.3	0.3
Pacific	515	0.0	0.8	0.7
Puerto Rico	50	0.0	2.3	2.3
Rural by Region:				
New England	61	4.6	0.1	4.7
Middle Atlantic	91	1.6	0.0	1.6
South Atlantic	343	0.8	1.3	2.1
East North Central	332	1.0	0.0	1.0
East South Central	309	1.1	1.4	2.5
West North Central	578	2.5	0.1	2.6
West South Central	434	2.0	0.5	2.5
Mountain	251	4.6	0.0	4.6
Pacific	166	2.5	0.0	2.5
Puerto Rico	8	0.0	0.0	0.0
Large Urban Areas (populations over 1 million)	1,548	0.0	0.7	0.6
Other Urban Areas (populations of 1 million or fewer)	1,554	0.1	0.5	0.5
Urban Hospitals	3,102	0.0	0.6	0.6
0-99 Beds	701	0.2	0.0	0.4
100-199 Beds	797	0.0	0.6	0.7
200-299 Beds	604	0.0	0.5	0.5
300-499 Beds	644	0.1	0.6	0.5
400 + Beds	292	0.0	0.7	0.6
Rural Hospitals	2,586	1.8	0.5	2.3
0-49 Beds	1,061	4.4	0.1	4.5
50-99 Beds	832	2.9	0.0	2.9
100-149 Beds	367	1.1	0.5	1.6

TABLE I.—IMPACT OF THE CHANGES BEING IMPLEMENTED EFFECTIVE APRIL 1, 1990—Continued

	Number of hospitals [1]	Column 1, Medicare dependent/ sole community hospitals [2]	Column 2, disproportionate share payments [3]	Column 3, all changes [4]
150–200 Beds	150	1.1	0.9	1.9
200+ Beds	149	0.7	1.0	1.7
Teaching Status:				
Non-Teaching	4,496	0.6	0.4	1.0
Resident/Bed Ratio Less than 0.25	963	0.0	0.5	0.5
Resident/Bed Ratio 0.25 or Greater	227	0.0	1.3	1.2
Disproportionate Share Hospitals (DSH):				
Non-DSH	4,110	0.5	0.0	0.5
Urban DSH:				
100 Beds or More	1,167	0.0	1.2	1.1
Fewer Than 100 Beds	81	0.0	0.0	0.0
Rural DSH				
100 Beds or More—not Rural Referral Centers or Sole Community Hospitals	83	0.0	2.8	2.7
Fewer than 100 beds—not Rural Referral Centers or Sole Community Hospitals	174	0.3	0.0	0.3
Sole Community Hospitals	41	8.2	5.2	14.0
Rural Referral Centers and Sole Community Hospitals or Rural Referral Centers	32	1.0	5.9	6.8
Urban Teaching and DSH:				
Both Teaching and DSH	609	0.0	1.3	1.2
Teaching and No DSH	498	0.0	0.0	0.0
No Teaching and DSH	639	0.0	1.1	1.0
No Teaching and No DSH	1,356	0.1	0.0	0.2
Other Special Status (Rural):				
Sole Community Hospitals	308	9.4	0.6	10.1
Rural Referral Centers	195	0.0	1.0	1.0
Sole Community & Rural Referral	23	8.3	0.3	8.5
Medicare-Dependent	608	6.8	0.0	6.9
Type of Ownership:				
Voluntary	3,116	0.2	0.4	0.7
Proprietary	918	0.3	0.5	0.7
Government	1,555	0.6	1.2	1.7
Medicare Utilization as Percent of Inpatient Days:				
0–25	400	0.1	2.4	2.3
25–50	2,983	0.2	0.6	0.7
50–65	1,737	0.5	0.2	0.7
Over 65	408	1.6	0.0	1.6

[1] Because data necessary to classify some hospitals by category were missing, some hospitals were omitted from the analysis. Therefore, the total number of hospitals in each category may not equal the national total.

[2] Data for the analysis of the payment alternatives granted under section 1886(d)(5)(D)(i) of the Act as amended by sections 6003 (e) and (f) of Public Law 101-239 come from FY 1986 and 1987 hospital cost reports. We determined for the approximately 970 Medicare-dependent, small rural hospitals and sole community hospitals in our database which payment alternative would provide the highest payment amount. Our payment determinations and those which each hospital's intermediary will make may differ because the intermediary will have the most recent hospital cost reports.

[3] Payment simulation of disproportionate share hospitals is based on 1988 discharge data and hospital cost report data for FY 1986 and FY 1987. The baseline for those sole community hospitals and Medicare-dependent, small rural hospitals that qualify for disproportionate share payments is the new payment methodology as provided for in sections 6003 (e) and (f) of Public Law 101-239 (analyzed in Column I).

[4] Column 3 includes combined payment alternatives for Medicare-dependent, small rural hospitals and sole community hospitals; new payment provisions for disproportionate share hospitals; and changes to the hospital wage index required by section 1886(d)(8)(C) of the Act as amended by section 6003(h) of Pub. L. 101-239.

2. Impact Simulation Results

a. *Impact on Sole Community Hospitals (SCHs) and Medicare-Dependent, Small Rural Hospitals.* Section 6003(e) of Public Law 101–239 revised the payment methodology for hospitals classified as SCHs effective with hospital cost reporting periods beginning on or after April 1, 1990. As of that date, as provided in section 1886(d)(5)(D)(i) of the Act, SCHs will be paid based on whichever of the following rates yields the highest aggregate payment for the cost reporting period.

- The Federal rate applicable to the hospital.
- The updated hospital-specific rate based on FY 1982 cost per discharge.
- The updated hospital-specific rate based on FY 1987 cost per discharge.

In a similar provision, section 6003(f) of Public Law 101–239, which added a new section 1886(d)(5)(G) of the Act, creates a new category of hospitals under the prospective payment system eligible for a special payment adjustment. The adjustment is limited to Medicare-dependent, small rural hospitals and is effective for cost reporting periods beginning on or after April 1, 1990 and ending on or before March 31, 1993. Section 6003(f) of Public Law 101–239 provides Medicare-dependent, small rural hospitals the same payment options afforded to sole community hospitals under section 6003(e) of Public Law 101–239. In section II.D. of this preamble, we discuss, in detail, the criteria for being classified as a Medicare-dependent, small rural hospital.

In our analysis of these provisions, we compared payments under our regulations in effect before April 1, 1990 with projected payments under the regulations that were effective on April 1, 1990 for sole community hospitals and hospitals we identified as meeting the criteria for a Medicare-dependent, small rural hospital based on the FY 1986, FY 1987 and FY 1988 cost reports that were available to us.

As part of our simulation we had to determine which of the three payment alternatives provided for in the law would produce the highest payment for each of the sole community hospitals and Medicare-dependent, small rural hospitals for which we had cost report data. Based on the available cost report data for each hospital, we compared payments based on the hospital-specific

payment amount using FY 1982 and FY 1987 base period costs to the total payment amount the hospital would receive based on the Federal standardized payment amount. That is, we examined the effects of changing only the payments for sole community hospitals and Medicare-dependent, small rural hospitals while holding all other variables at their pre-April 1, 1990 levels.

The following summarizes our determinations with respect to the method of payment used in simulating payments to Medicare-dependent, small rural hospitals:

- 25 percent of the identifiable Medicare-dependent, small rural hospitals will be paid a hospital-specific rate based on their FY 1982 cost reporting period.
- 22.2 percent of the hospitals will be paid a hospital-specific rate based on their FY 1987 cost reporting period.
- 52.8 percent of the hospitals will be paid the Federal national payment rate.

We made similar determinations for all sole community hospitals (including sole community hospitals that are also rural referral centers) concerning which method of payment would result in the highest payment for each hospital. Using the available cost report data, we determined that—

- 44.7 percent of all sole community hospitals will be paid a hospital-specific rate based on their FY 1982 cost reporting period;
- 28.8 percent of all sole community hospitals will be paid a hospital-specific rate based on their FY 1987 cost reporting period; and
- 26.5 percent will be paid the Federal payment rate.

Overall, the provisions of sections 6003 (e) and (f) of Public Law 101–239 will raise the national average payment to hospitals by 0.3 percent. The impact of these changes, however, will be concentrated on the approximately 970 hospitals we have identified as being either a sole community or a Medicare-dependent small rural hospital.

We anticipate that payments to hospitals that qualify as Medicare-dependent, small rural hospitals will increase by about 6.8 percent. Payments to sole community hospitals and sole community hospitals that are also rural referral centers are expected to increase by 9.4 percent and 8.3 percent, respectively. Payment to sole community hospitals that also qualify as disproportionate share hospitals will increase by 8.2 percent. However, sole community hospitals that are also rural referral centers and disproportionate share hospitals can expect only a 1.0 percent increase in payments.

Since sections 6003 (e) and (f) of Public Law 101–239 are intended primarily to benefit rural hospitals, rural hospitals in all bed-size groupings are projected to receive increases, with hospitals having fewer than 50 beds receiving the largest percentage increases of 4.4 percent.

Our geographic analysis shows the largest percentage increase in payments concentrated in the rural portions of the Mountain and New England census divisions. We are projecting both areas to receive a payment increase of about 4.6 percent. However, because we have identified 14 sole community hospitals located in urban areas, average payments to urban hospitals in the south Atlantic and Mountain census division are projected to increase 0.1 percent.

b. *Impact on Disproportionate Share Hospitals.* Section 6003(c)(2) of Public Law 101–239 amended section 1886(d)(5)(F)(v) of the Act by adding an additional criterion for qualifying as a disproportionate share hospital. A hospital will qualify for disproportionate share payments if it is located in a rural area, is classified as a sole community hospital or has more than 100 beds, and its disproportionate share patient percentage during the current cost reporting year is 30 percent.

Sections 6003(c) (2) and (3) of Public Law 101–239 amended section 1886(d)(5)(F) of the Act by providing increased payments to hospitals for their disproportionate share patients. Section II.C. of this preamble describes in detail the changes in the payment formulas.

In this analysis, except for those sole community hospitals (and sole community hospitals that are also rural referral centers) that now qualify for disproportionate share payments, we compared only the changes in disproportionate share payments that are effective on April 1, 1990 with disproportionate share payments based on policies in effect before April 1, 1990. For sole community hospitals and Medicare-dependent, small rural hospitals that qualify for disproportionate share payments, we compared projected April 1, 1990 disproportionate share payment amounts to payments based on the standardized Federal payment amount as the baseline payment level rather than the payment blend of 75 percent hospital-specific amount and 25 percent standardized Federal payment amount that was in effect before April 1, 1990. We adopted this approach for sole community hospitals because section 1886(d)(5)(F)(ii) of the Act requires that only those hospitals that receive payment based on the Federal payment amount can receive additional payments for treating disproportionate share patients. As discussed in the previous section of this impact analysis and in section II.D. of the preamble to this rule, sections 6003 (e) and (f) of Public Law 101–239 allow sole community hospitals and Medicare-dependent, small rural hospitals to be paid the higher of the Federal standardized rate or a hospital-specific rate. We believe that an impact analysis of the increase in disproportionate share payments for qualifying sole community hospitals and Medicare-dependent, small rural hospitals is more fairly presented by comparing the increase in disproportionate share payments to a baseline reflecting the payment alternatives contained in sections 6003 (e) and (f) of Public Law 101–239 (that is, the Federal standardized amount) rather than to the pre-April 1, 1990 baseline.

This analysis shows that 41 sole community hospitals paid on the basis of the Federal rate will also be eligible for the increased payments for rural disproportionate share hospitals. We project that these sole community hospitals will receive a 5.2 percent increase in payments as a result of the changes in the disproportionate share payment policies.

The largest percentage increase in disproportionate share payments is expected to go to hospitals that are classified as rural referral centers or as both rural referral centers and sole community hospitals. We expect these hospitals to receive an average payment increase of about 5.9 percent.

In terms of hospital bed size, hospitals in all but two bed size categories are expected to receive payment increases. The two categories that will not receive payment increases are urban hospitals with fewer than 100 beds, and rural hospitals with between 50 and 99 beds.

Geographically, the payment increase will be distributed widely among hospitals located in urban areas. The projected average percentage increase in payments for all hospitals in urban areas is 0.6 percent, with increases in 7 of the 10 geographic regions displayed in Table I expected to equal or exceed 0.6 percent. Urban hospitals in the other three geographical regions are expected to receive increases of between 0.2 and 0.4 percent. The largest percentage increase of 2.3 percent is projected for urban hospitals in Puerto Rico.

The average payment increase for all rural hospitals is expected to be 0.5 percent. In contrast to the broad increases for urban hospitals, increases for rural hospitals will be concentrated in the East South Central and South

Atlantic census divisions. These areas are expected to receive increases averaging 1.4 percent and 1.3 percent, respectively.

c. *Combined Impact of All Changes.* Column 3 of table I presents the combined effects of all changes being implemented in this final rule. That is, column 3 combines the changes in payments for Medicare-dependent, small rural hospitals and sole community hospitals, and the changes in qualifying criteria and payment formulas for disproportionate share hospitals. In addition, column 3 includes the effects of revising the wage index values for hospitals located in certain rural counties adjacent to urban areas as required by section 1886(d)(8)(C) of the Act, as amended by section 6003(h) of Public Law 101-239 and changes in the outlier offset for urban hospitals.

At the national level, the effect of all provisions being implemented in this final rule is to increase the average payment to hospitals by 0.8 percent. As expected, the largest payment increases go to sole community hospitals that also qualify as disproportionate share hospitals. We estimate that they will receive an average payment increase of 14.0 percent. Overall, sole community hospitals are expected to receive a 10.1 percent increase in payments. Hospitals identified in our database as Medicare-dependent, small rural hospitals can expect an increase of 6.9 percent. As a result of the changes being implemented in this final rule, average payments to all rural hospitals are projected to rise 2.3 percent, with rural hospitals with fewer than 50 beds expected to receive a 4.5 percent increase. Average payments to urban hospitals will increase by 0.6 percent, with urban hospitals with between 100 and 199 beds receiving a 0.7 percent increase in payments.

Our impact analysis of the census divisions shows that rural hospitals in the New England census division will receive the largest payment increase of 4.7 percent. Urban hospitals in the Puerto Rico will receive the largest increase among urban hospitals. We expect these hospitals to receive an average increase of about 2.3 percent.

As a final point, there are interactions that result from the combining of the various separate provisions analyzed in the previous columns that we are unable to isolate. Thus, the values appearing in column 3 do not represent merely the additive effects of the previous columns, but include certain interactive effects that we are not able to isolate.

Table II presents the projected average payments per case that are effective April 1, 1990 for urban and rural hospitals and for the different categories of hospitals shown in table I and compares them with the average estimated per case payments that were effective January 1, 1990. As such, this table presents, in terms of the average dollar amounts paid per discharge, the combined effects of the changes presented in table I. That is, the percentage change in average payments from January 1, 1990 to April 1, 1990 equals the percentage changes shown in the last column of table I.

TABLE II—COMPARISON OF PAYMENT PER CASE (JANUARY 1, 1990 COMPARED TO APRIL 1, 1990)

	Number of hospitals	Column 1 average payment per case Jan. 1, 1990	Column 2 average payment per case Apr. 1, 1990	Column 3 all changes [1]
All hospitals	5,688	$4,788	$4,828	0.8
Urban by Region:				
New England	182	5,427	5,441	0.3
Middle Atlantic	482	5,669	5,707	0.7
South Atlantic	444	4,798	4,832	0.7
East North Central	540	5,158	5,180	0.4
East South Central	179	4,449	4,475	0.6
West North Central	200	5,314	5,327	0.2
West South Central	374	4,829	4,868	0.8
Mountain	119	5,197	5,213	0.3
Pacific	515	6,022	6,066	0.7
Puerto Rico	50	2,072	2,120	2.3
Rural by Region:				
New England	61	3,738	3,914	4.7
Middle Atlantic	91	3,509	3,564	1.6
South Atlantic	343	3,182	3,249	2.1
East North Central	332	3,207	3,239	1.0
East South Central	309	2,752	2,821	2.5
West North Central	578	2,982	3,060	2.6
West South Central	434	2,890	2,963	2.5
Mountain	251	3,300	3,451	4.6
Pacific	166	3,876	3,972	2.5
Puerto Rico	8	1,558	1,558	0.0
Large urban areas (population over 1 million)	1,548	5,704	5,740	0.6
Other urban areas (population of 1 million or fewer)	1,554	4,754	4,779	0.5
Urban hospitals	3,102	5,239	5,270	0.6
0-99 beds	701	3,950	3,966	0.4
100-199 beds	797	4,475	4,506	0.7
200-299 beds	604	4,872	4,897	0.5
300-499 beds	644	5,316	5,346	0.5
Over 400 beds	292	6,274	6,314	0.6
Rural hospitals	2,586	3,128	3,201	2.3
0-49 beds	1,061	2,686	2,807	4.5
50-99 beds	832	2,872	2,956	2.9
100-149 beds	367	3,096	3,146	1.6
150-200 beds	150	3,295	3,359	1.9
Over 200 beds	149	3,653	3,714	1.7
Teaching Status:				
Non-teaching resident/bed ratio	4,496	4,004	4,045	1.0
Less than 0.25 resident/bed ratio	963	5,277	5,301	0.5
0.25 or greater	227	7,860	7,953	1.2

TABLE II—COMPARISON OF PAYMENT PER CASE (JANUARY 1, 1990 COMPARED TO APRIL 1, 1990)—Continued

	Number of hospitals	Column 1 average payment per case Jan. 1, 1990	Column 2 average payment per case Apr. 1, 1990	Column 3 all changes [1]
Disproportionate Share Hospitals (DSH):				
Non-DSH	4,110	4,373	4,394	0.5
Urban DSH:				
100 beds or more	1,167	5,754	5,819	1.1
Fewer than 100 beds	81	3,637	3,637	0.0
Rural DSH:				
100 beds or more—not rural referral centers or sole community hospitals	83	2,843	2,921	2.7
Fewer than 100 beds—not rural referral centers or sole community hospitals	174	2,563	2,572	0.3
Sole community hospitals	41	2,840	3,237	14.0
Sole community & rural referral center or rural referral centers	32	3,721	3,973	6.8
Urban Teaching and DSH:				
Both teaching and DSH	609	6,351	6,426	1.2
Teaching and no DSH	498	5,449	5,449	0.0
No teaching and DSH	639	4,681	4,730	1.1
No teaching and no DSH	1,356	4,410	4,418	0.2
Other Special Status (rural):				
Sole community hospital	308	3,157	3,476	10.1
Rural referral center (RRC)	195	3,732	3,770	1.0
Sole community and rural referral center	23	3,723	4,041	8.5
Medicare-dependent	608	2,703	2,688	6.9
Type of Ownership:				
Voluntary	3,116	4,959	4,992	0.7
Proprietary	918	4,280	4,312	0.7
Government	1,555	4,367	4,443	1.7
Medicare Utilization As Percent of Inpatient Days:				
0-25	400	6,320	6,468	2.3
25-50	2,983	5,005	5,040	0.7
50-65	1,737	4,227	4,258	0.7
Over 65	408	4,038	4,104	1.6

[1] Percentage changes shown in this column are taken from Table 1, column 3. Because the dollar amounts shown in this table are rounded to the nearest dollar, percentage changes computed on the basis of the amounts in columns 1 and 2 of this table will differ slightly from those displayed in this column.

VI. Other Required Information

A. Effective Dates

The effective date of this final rule (including the addendum) is April 1, 1990. Changes made by section 101(c) of Public Law 101-234 (eliminating the outlier payments attributable to catastrophic coverage) are applicable to discharges occurring on or after January 1, 1990 and changes required by section 101(d) of Public Law 101-234 to target rates for hospitals excluded from the prospective payment system are applicable for cost reporting periods beginning on or after January 1, 1990. Changes made by the following sections are applicable for discharges occurring on or after April 1, 1990: section 6003(c)(2) of Public Law 101-239 (disproportionate share adjustments) and section 6003(h) of Public Law 101-239 (wage index revisions for rural counties whose hospitals are deemed urban). Changes made by the following sections of Public Law 101-239 are applicable for cost reporting periods beginning on or after April 1, 1900: section 6015 (ceiling on rate of hospital cost increases); section 6003(f) (Medicare-dependent, small rural hospitals); and, section 6003(e) (sole community hospitals). Changes made by section 6011 of Public Law 101-239 (administering blood clotting factors to hemophiliacs, who are inpatients) are applicable for discharges occurring on or after June 19, 1990. Changes made by section 6205(a) of Public Law 101-239 (recognition of hospital-based nursing school costs) are effective for cost reporting periods beginning on or after December 19, 1989.

B. Waiver of Notice of Proposed Rulemaking and 30-Day Delay in the Effective Date

We ordinarily publish a notice of proposed rulemaking for a regulation to provide a period for public comment. However we may waive that procedure if we find good cause that prior notice and comment are impractical, unnecessary, or contrary to public interest. In addition, section 1871(b)(2)(B) of the Act provides that the notice of proposed rulemaking is not required if a statute establishes a specific deadline for implementation that is less than 150 days from enactment. Because several provisions of Public Law 101-239, enacted December 19, 1989, and several provisions of Public Law 101-234, enacted December 14, 1989, contained in this final rule require implementation within 150 days, we are implementing this final rule without first issuing a notice of proposed rulemaking. However, we are providing a 60-day comment period for public comment, as indicated at the beginning of this final rule.

In addition, we normally provide a delay of 30 days in the effective date for documents such as this. However, if adherence to this procedure would be impractical, unnecessary, or contrary to public interest, we may waive the delay in the effective date. Under the clear direction contained in Public Law 101-239, the effective date for the majority of the provisions included in this final rule is April 1, 1990, just as several provisions of Public Law 102-234 went into effect on January 1, 1990. In general, the provisions of Public Law 101-239 implemented in this final rule are beneficial to most hospitals. If we were to provide for a 30-day delay in the effective date for these changes, most hospitals would be deprived of the full benefits of these provisions. Thus, a 30-day delay in the effective date would be contrary to the public interest. Therefore, we find good cause to waive the usual 30-day delay.

C. Paperwork Reduction Act

This final rule does not impose information collection requirements. Consequently, it need not be reviewed

by the Executive Office of Management and Budget under the authority of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 through 3511).

D. Public Comments

Because of the large number of items of correspondence we normally receive concerning regulations, we cannot acknowledge or respond to the comments individually. However, if we decide that changes are necessary as a result of our consideration of all comments received by the date and time specified in the "DATES" section of this preamble, we will respond to the comments and issue any appropriate changes in the final rule that implements changes to the inpatient hospital prospective payment system and sets forth the FY 1991 rates, which will be published on approximately September 1, 1990.

List of Subjects

42 CFR Part 412

Health facilities, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

42 CFR chapter IV is amended as set forth below:

CHAPTER IV—HEALTH CARE FINANCING ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Subchapter B—Medicare Program

I. Part 412 is amended as follows:

PART 412—PROSPECTIVE PAYMENT SYSTEM FOR INPATIENT HOSPITAL SERVICES

A. The authority citation for part 412 continues to read as follows:

Authority: Secs. 1102, 1122, 1815(e), 1871, and 1886 of the Social Security Act (42 U.S.C. 1302, 1320a–1, 1395g(e), 1395hh, and 1395ww).

B. In subpart A, § 412.2, the introductory text in paragraph (e) is revised and a new paragraph (e)(7) is added to read as follows:

Subpart A—General Provisions

§ 412.2 Basis of payment.

* * * * *

(e) *Additional payments to hospitals.* In addition to payments based on the prospective payment rates, hospitals receive payments for the following:

* * * * *

(7) For discharges on or after June 19, 1990 and before December 19, 1991, a payment amount per unit for blood clotting factor provided to Medicare inpatients who are hemophiliacs.

C. In subpart D, § 412.63, paragraph (h) is revised; paragraphs (i), (j), and (k) are redesignated as paragraphs (j), (k), and (l), respectively; and a new paragraph (i) is added, to read as follows:

Subpart D—Basic Methodology for Determining Federal Prospective Payment Rates

§ 412.63 Federal rates for fiscal years after Federal fiscal year 1984.

* * * * *

(h) *Applicable percentage change for fiscal year 1990.* (1) The applicable percentage change for fiscal year 1990 is—

(i) For discharges occurring on or after October 1, 1989 and before January 1, 1990, 5.5 percent; and

(ii) For discharges occurring on or after January 1, 1990 and before October 1, 1990—

(A) 9.72 percent for hospitals located in rural areas;

(B) 5.62 percent for hospitals located in large urban areas; and

(C) 4.97 percent for hospitals located in other urban areas.

(2) For purposes of determining the standardized amounts for discharges occurring on or after October 1, 1990, the applicable percentage change for fiscal year 1990 is deemed to have been the percentage change provided for in paragraph (h)(1)(ii) of this section.

(i) *Applicable percentage change for fiscal year 1991 and following.* The applicable percentage change for fiscal year 1991 and each subsequent fiscal year for hospitals in all areas is the percentage increase in the market basket index (as described in § 413.40(c)(3)(ii)).

* * * * *

D. Subpart E is amended as follows:

Subpart E—Determination of Transition Period Payment Rates

1. In § 412.73, the title is revised to read "Determination of the hospital-specific rate based on a Federal fiscal year 1982 base period."; paragraph (c)(6) is revised; and new paragraphs (c)(7) and (c)(8) are added to read as follows:

§ 412.73 Determination of the hospital-specific rate based on a Federal fiscal year 1982 base period.

* * * * *

(c) *Updating base-year costs.* * * *

(6) *For Federal fiscal year 1989.* For cost reporting periods beginning in Federal fiscal year 1989, the update factor is determined using the methodology set forth in § 412.63(g).

(7) *For Federal fiscal year 1990.* (i) For cost reporting periods beginning in Federal fiscal year 1990, the base-period cost per discharge is updated as follows:

(A) For cost reporting periods beginning on or after October 1, 1989 and before January 1, 1990, by 5.5 percent for discharges occurring before January 1, 1990 and by the factors set forth in paragraph (c)(7)(i)(B) of this section for discharges occurring on or after January 1, 1990.

(B) For cost reporting periods beginning on or after January 1, 1990 and before October 1, 1990, by—

(*1*) 9.72 percent for hospitals located in rural areas;

(*2*) 5.62 percent for hospitals located in large urban areas; and

(*3*) 4.97 percent for hospitals located in other urban areas.

(ii) For purposes of determining the updated base-period costs for cost reporting periods beginning in Federal fiscal year 1991 (that is, beginning on or after October 1, 1990 and before October 1, 1991), the update factor for the cost reporting period beginning during Federal fiscal year 1990 is deemed to have been the percentage change provided for in paragraph (c)(7)(i)(B) of this section.

(8) *For Federal fiscal years 1991 and following.* For Federal fiscal years 1991 and following, the update factor is determined using the methodology set forth in § 412.63(i).

* * * * *

2. A new § 412.75 is added to read as follows:

§ 412.75 Determination of the hospital-specific rate based on a Federal fiscal year 1987 base period.

(a) *Base period costs.* (1) For each hospital, the intermediary determines the hospital's Medicare Part A allowable inpatient operating costs, as described in § 412.2(c), for the 12-month or longer cost reporting period ending on or after September 30, 1987 and before September 30, 1988.

(2) If the hospital's last cost reporting period ending before September 30, 1988 is for less than 12 months, the base period is the hospital's most recent 12-month or longer cost reporting period ending before the short period report.

(b) *Costs on a per discharge basis.* The intermediary determines the hospital's average base-period operating cost per discharge by dividing the total operating costs by the number of discharges in the base period.

(c) *Case-mix adjustment.* The intermediary divides the average base-period cost per discharge by the

hospital's case-mix index for the base period.

(d) *Updating base-period costs.* For purposes of determining the updated base-period costs for cost reporting periods beginning in Federal fiscal year 1988, the update factor is determined using the methodology set forth in § 412.73 (c)(5) through (c)(8) of § 412.63.

(e) *DRG adjustment.* The applicable hospital-specific cost per discharge will be multiplied by the appropriate DRG weighting factor to determine the hospital-specific base payment amount (target amount) for a particular covered discharge.

(f) *Modification of base-period costs.* (1) The intermediary may modify base-period costs to take into account additional costs recognized as allowable costs for the hospital's base-period as the result of any of the following:

(i) A reopening and revision of the hospital's base-period notice of amount of program reimbursement under §§ 405.1885 through 405.1889 of this chapter.

(ii) A prehearing order or finding issued during the provider payment appeals process by the appropriate reviewing authority under § 405.1821 or § 405.1853 of this chapter that resolved a matter at issue in the hospital's base-period notice of amount of program reimbursement.

(iii) An affirmation, modification, or reversal of a Provider Reimbursement Review Board decision by the Administrator of HCFA under § 405.1875 of this chapter that resolved a matter at issue in the hospital's base-period notice of amount of program reimbursement.

(iv) An administrative or judicial review decision under §§ 405.1831, 405.1871, or 405.1877 of this chapter that is final and no longer subject to review under applicable law or regulations by a higher reviewing authority, and that resolved a matter at issue in the hospital's base-period notice of amount of program reimbursement.

(v) A final, nonappealable court judgment relating to the base-period costs.

(2) The intermediary recalculates the hospital's base-period costs to reflect the modification determined appropriate under paragraph (f)(1) of this section and the adjustments are effective retroactively to the time of the intermediary's initial determination of base-period costs.

Subpart F—Payment for Outlier Cases

§ 412.84 [Amended]

E. In subpart F, in the first sentence of § 412.84(h), the word "annually" is removed.

F. Subpart G is amended as follows:

Subpart G—Special Treatment of Certain Facilities

1. In § 412.90, a new paragraph (i) is added to read as follows:

§ 412.90 General rules.

* * * * *

(i) *Medicare-dependent, small rural hospitals.* For cost reporting periods beginning on or after April 1, 1990, and ending before April 1, 1993, HCFA adjusts the prospective payment rates determined under subparts D and E of this part if a hospital is classified as a Medicare-dependent, small rural hospital. Criteria for identifying these hospitals are set forth in § 412.108.

2. In § 412.92, the introductory text of paragraph (a) and paragraphs (b)(2)(i) and (d)(1) are revised; the first sentence in paragraph (e) is revised by deleting the words "and before October 1, 1990"; the existing introductory text of paragraph (e)(3)(i) is redesignated as paragraph (e)(3)(i)(A); the existing paragraph (e)(3)(i)(A) is redesignated as the introductory text of paragraph (e)(3)(i); and the first sentence in paragraph (f) is amended by removing the words "and before October 1, 1990".

§ 412.92 Special treatment: Sole community hospitals.

(a) *Criteria or classification as a sole community hospital.* HCFA classifies a hospital as a sole community hospital if it is located in a rural area (as defined in § 412.63(b)) and meets one of the following conditions.

* * * * *

(b) *Classification procedures.* * * *

(2) *Effective dates of classification.* (i) Sole community hospital status is effective 30 days after the date of HCFA's written notification of approval.

* * * * *

(d) *Determining prospective payment rates for sole community hospitals.*—(1) *General rule.* For cost reporting periods beginning on or after April 1, 1990, a sole community hospital is paid based on whichever of the following amounts yields the greatest aggregate payment for the cost reporting period:

(i) The Federal payment rate applicable to the hospitals as determined under § 412.63, subject to the regional floor defined in § 412.70(c)(6).

(ii) The hospital-specific rate as determined under § 412.73.

(iii) The hospital-specific rate as determined under § 412.75.

* * * * *

§ 412.96 [Amended]

3. In § 412.96(b)(1)(ii), the number "25" is changed to "275".

4. In § 412.106, the introductory texts of paragraphs (c) and (c)(1) are republished; paragraphs (c)(1) (ii) and (iii) are redesignated as paragraphs (c)(1) (iii) and (iv); a new paragraph (c)(1)(ii) is added; newly redesignated paragraph (c)(1)(iv) is revised; paragraph (d)(1) is revised; paragraph (d)(2) is removed; and paragraph (d)(3) is redesignated as paragraph (d)(2) and revised to read as follows:

§ 412.106 Special treatment: Hospitals that service a disproportionate share of low-income patients.

* * * * *

(c) *Criteria for classification.* A hospital is classified as a "disproportionate share" hospital under any of the following circumstances:

(1) The hospital's disproportionate patient percentage, as determined under paragraph (b)(5) of this section, is at least equal to one of the following: * * *

(ii) 30 percent, if the hospital is located in a rural area and either has more than 100 beds and fewer than 500 beds or is classified as a sole community hospital under § 412.92 of this subpart.

* * * * *

(iv) 45 percent, if the hospital is located in a rural area and has 100 or fewer beds.

* * * * *

(d) *Payment adjustment*—(1) *Method of adjustment.* If a hospital serves a disproportionate number of low-income patients, its total DRG revenues are increased by an adjustment factor as specified in paragraph (d)(2) of this section.

(2) *Payment adjustment factors.* (i) If the hospital meets the criteria of paragraph (c)(1)(i) of this section, the payment adjustment factor is equal to one of the following:

(A) If the hospital's disproportionate patient percentage is greater than 20.2 percent, the payment adjustment factor is 5.62 percent plus 65 percent of the difference between 20.2 percent and the hospital's disproportionate patient percentage.

(B) If the hospital's disproportionate patient percentage is less than 20.2 percent, the payment adjustment factor is 2.5 percent plus 60 percent of the difference between 15 percent and the hospital's disproportionate patient percentage.

(ii) If the hospital meets the criteria of paragraph (c)(1)(ii) of this section, the payment adjustment factor is equal to one of the following:

(A) If the hospital is classified as a rural referral center, the payment adjustment factor is 4 percent plus 60 percent of the difference between the hospital's disproportionate patient percentage and 30 percent.

(B) If the hospital is classified as a sole community hospital, the payment adjustment factor is 10 percent.

(C) If the hospital is classified as both a rural referral center and a sole community hospital, the payment adjustment factor is the greater of 10 percent or 4 percent plus 60 percent of the difference between the hospital's disproportionate patient percentage and 30 percent.

(D) If the hospital is not classified as either a sole community hospital or a rural referral center, the payment adjustment factor is 4 percent.

(iii) If the hospital meets the criteria of paragraph (c)(1)(iii) of this section, the payment adjustment factor is equal to 5 percent.

(iv) If the hospital meets the criteria of paragraph (c)(1)(iv) of this section, the payment adjustment factor is 4 percent.

(v) If the hospital meets the criteria of paragraph (c)(2) of this section, the payment adjustment factor is 30 percent.

5. A new § 412.108 is added to read as follows:

§ 412.108 Special treatment: Medicare-dependent, small rural hospitals.

(a) *Criteria for classification as a Medicare-dependent, small rural hospital*— (1) *General considerations.* For cost reporting periods beginning on or after April 1, 1990 and ending before April 1, 1993, a hospital is classified as a Medicare-dependent, small rural hospital if it is located in a rural area (as defined in § 412.63(b)) and meets all the following conditions:

(i) The hospital has 100 or fewer beds as defined in § 412.118(b) during the cost reporting period.

(ii) The hospital is not also classified as a sole community hospital under § 412.92.

(iii) At least 60 percent of the hospital's inpatient days or discharges were attributable to individuals receiving Medicare Part A benefits during the hospital's 12-month or longer cost reporting period ending on or after September 30, 1987 and before September 30, 1988. If the hospital's last cost reporting period ending before September 30, 1988 is for less than 12 months, the hospital's most recent 12-month or longer cost reporting period ending before the short period is used.

(2) *Counting days and discharges.* In counting inpatient days and discharges for purposes of meeting the criteria in paragraph (a)(1)(iii) of this section, only days and discharges from acute care inpatient stays are counted, including days and discharges from swing beds, but not including days and discharges from distinct part units excluded from the prospective payment system under §§ 412.25 through 412.32 or from newborn nursery units.

(b) *Classification procedures.* The fiscal intermediary determines whether a hospital meets the criteria in paragraph (a) of this section. If a hospital disagrees with an intermediary's decision, it should notify its intermediary and submit documentable evidence that it meets the criteria.

(c) *Payment methodology.* A hospital that meets the criteria in paragraph (a) of this section is paid based on whichever of the following amounts yields the greatest aggregate payment for the cost reporting period:

(1) The Federal payment rate applicable to the hospital as determined under § 412.63, subject to the regional floor defined in § 412.70(c)(6).

(2) The hospital-specific rate as determined under § 412.73.

(3) The hospital-specific rate as determined under § 412.75.

(d) *Additional payments to hospitals experiencing a significant volume decrease.* (1) HCFA provides for a payment adjustment for a Medicare-dependent, small rural hospital for any cost reporting period during which the hospital experiences, due to circumstances as described in paragraph (d)(2) of this section, a more than 5 percent decrease in its total inpatient discharges as compared to its immediately preceding cost reporting period. If either the cost reporting period in question or the immediately preceding cost reporting period is other than a 12-month cost reporting period, the intermediary must convert the discharges to a monthly figure and multiply this figure by 12 to estimate the total number of discharges for a 12-month cost reporting period.

(2) To qualify for a payment adjustment on the basis of a decrease in discharges, a Medicare-dependent, small rural hospital must submit its request no later than 180 days after the date on the intermediary's Notice of Amount of Program Reimbursement and it must—

(i) Submit to the intermediary documentation demonstrating the size of the decrease in discharges and the resulting effect on per discharge costs; and

(ii) Show that the decrease is due to circumstances beyond the hospital's control.

(3) The intermediary determines a lump sum adjustment amount not to exceed the difference between the hospital's Medicare inpatient operating costs and the hospital's total DRG revenue based on DRG-adjusted prospective payment rates (including outlier payments determined under Subpart F of this part and additional payments made for hospitals that serve a disproportionate share of low-income patients as determined under § 412.106 and for indirect medical education costs as determined under § 412.118).

(i) In determining the adjustment amount, the intermediary considers—

(A) The individual hospital's needs and circumstances, including the reasonable cost of maintaining necessary core staff and services in view of minimum staffing requirements imposed by State agencies;

(B) The hospital's fixed (and semi-fixed) costs, other than those costs reimbursed on a reasonable cost basis under part 413 of this chapter; and

(C) The length of time the hospital has experienced a decrease in utilization.

(i) The intermediary makes its determination within 180 days from the date it receives the hospital's request and all other necessary information.

(ii) The intermediary determination is subject to review under subpart R of part 405 of this chapter.

G. In subpart H, § 412.115, a new paragraph (c) is added to read as follows:

Subpart H—Payments to Hospitals Under the Prospective Payment System

§ 412.115 Additional payments.

* * * * *

(c) *Administration of blood clotting factor.* For discharges on or after June 19, 1990, and before December 19, 1991, an additional payment is made to a hospital for each unit of blood clotting factor furnished to a Medicare inpatient who is hemophiliac.

II. 42 CFR part 413 is amended as follows:

PART 413—PRINCIPLES OF REASONABLE COST OF REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES

A. The authority citation for part 413 is revised to read as follows:

Authority: Sec. 1102, 1814(b), 1815, 1833(a), 1861(v), 1871, 1881, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395f(b), 1395g, 1395l(a), 1395x(v), 1395hh, 1395rr, and 1395ww) and sec. 104(c) of Pub. L. 100-360 as amended by sec. 608(d)(3) of Pub. L. 100-485

(42 U.S.C. 1395ww (note)) and sec. 101(c) of Pub. L. 101-234.

B. In § 413.40, paragraph (i) is revised; and a new paragraph (j) is added to read as follows:

§ 413.40 Ceiling on rate of hospital cost increases.

* * * * *

(i) *Target amount revisions for the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100-360)*—(1) *General rule.* For cost reporting periods or any portion of a cost reporting period occurring on or after January 1, 1989 and before January 1, 1990, the intermediary may adjust a hospital's target amount to take into account any distortion in operating costs between the hospital's base period and the period subject to the rate of increase ceiling due to the elimination of part A inpatient hospital benefit limitations under section 101 of the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100-360).

(2) *Request for adjustment.* A hospital must request an adjustment no later than 180 days after the close of the affected cost reporting period. A request for adjustment must include the following:

(i) A statement from the hospital specifying that the adjustment is to be based on its historical experience in—

(A) Its base period; or

(B) Its last cost reporting period ending before January 1, 1989. (If this period is less than 12 months in duration, multiple consecutive cost reporting periods comprising at least 12 months must be used.)

(ii) The hospital's cost report or reports for the period selected by the hospital under paragraph (i)(2)(i) of this section to serve as the basis for the adjustment.

(iii) Billing data for the cost reporting period selected under paragraph (i)(2)(i) of this section as the basis for the adjustment documenting the following:

(A) The number of hospital inpatient days furnished to Medicare beneficiaries for which no payment was made because the beneficiary had exhausted part A hospital benefits during an inpatient hospital stay. (Excluded from the count are days for stays that were not covered in their entirety because, prior to admission, the beneficiary had exhausted both part A hospital benefits and days in excess of the lifetime limitation on inpatient psychiatric hospital services.)

(B) The number of discharges applicable to Medicare beneficiaries for which no payment was made because the beneficiary had exhausted part A hospital benefits during the hospital stay but in a prior cost reporting period.

(C) The actual charges for ancillary services furnished on the days counted in paragraph (i)(2)(iii)(A) of this section. (A hospital that is unable to document its ancillary charges may substitute average cost per diem for actual charges for ancillary services.)

(3) *Amount of adjustment.* The adjustment is based on the estimated incremental costs of care historically furnished to Medicare beneficiaries after they had exhausted their benefits during an inpatient hospital stay. The adjustment is calculated as follows:

(i) *Step 1*—Determine the average cost per Medicare discharge by dividing the Medicare allowable inpatient operating costs for covered days of care in the base year or the last cost reporting period ending before January 1, 1989 by the number of Medicare discharges in that cost reporting period.

(ii) *Step 2*—Determine the estimated costs for ancillary services furnished to beneficiaries after exhaustion of part A hospital benefits. (If actual ancillary charges are available, ancillary costs are estimated by applying departmental cost-to-charge ratios from the cost report to the ancillary charges. If actual ancillary charges cannot be retrieved from the hospital's system, an ancillary per diem amount may be used in completing this step.)

(iii) *Step 3*—Determine the estimated routine costs of Medicare inpatient days furnished to beneficiaries after exhaustion of part A hospital benefits (days of care multiplied by the Medicare allowable inpatient operating cost per diem (obtained from the cost report). (No-charge-structure and all-inclusive-rate hospitals use total inpatient operating costs per diem (which equals the Medicare allowable inpatient operating costs in the cost reporting period divided by total Medicare inpatient days).

(iv) *Step 4*—Determine the total inpatient operating costs for beneficiaries notwithstanding exhaustion of part A hospital benefits (by adding the Medicare allowable inpatient operating costs in the cost reporting period plus the sum of the numbers computed in paragraphs (i)(3)(ii) and (i)(3)(iii) of this section).

(v) *Step 5*—Determine the total number of Medicare discharges notwithstanding exhaustion of part A hospital benefits by adding the number of Medicare discharges for the cost reporting period and the number of discharges for beneficiaries who had exhausted part A hospital benefits in the prior cost reporting period and were discharged during the subsequent period.

(vi) *Step 6*—Determine the average cost per discharge notwithstanding exhaustion of part A hospital benefits by dividing the number computed in paragraph (i)(3)(iv) of this section by the number computed in paragraph (i)(3)(v) of this section.

(vii) *Step 7*—Determine the ratio of average cost per discharge notwithstanding exhaustion of part A hospital benefits to average cost per discharge (by dividing the number computed in paragraph (i)(3)(vi) of this section by the number computed in paragraph (i)(3)(iii) of this section).

(viii) *Step 8*—Determine the adjusted target rate applicable to the discharges in any cost reporting period or portion of a cost reporting period occurring on or after January 1, 1989 and before January 1, 1990 by multiplying the updated target rate applicable to the cost reporting period or portion of the cost reporting period occurring on or after January 1, 1989 by the number computed in paragraph (i)(3)(vii) of this section

(ix) *Step 9*—Determine the appropriate target rate for portions of any cost reporting period occurring on and after January 1, 1990 by updating the hospitals' target rate prior to adjustment pursuant to paragraphs (i)(3)(i) through (i)(3)(viii).

(4) *Time period for determination and notification.* The intermediary notifies the hospital of the adjustment to the target rate for cost reporting periods or any portion of a cost reporting period occurring on or after January 1, 1989 and before January 1, 1990 no later than 90 days after receipt of all data needed to make the determination. An interim adjustment is made if the notice of amount of program reimbursement has not been issued for the period selected under paragraph (i)(2)(i) of this section. If an interim adjustment is made, the intermediary notifies the hospital of the final adjustment to the target rate no later than 30 days after the notice of amount of program reimbursement is issued for the period selected under paragraph (i)(2)(i) of this section.

(j) *Assignment of a new base period*—(1) *General rule.* (i) Effective with cost reporting periods beginning on or after April 1, 1990, HCFA may assign a new base period to establish a revised ceiling if the new base period is more representative of the reasonable and necessary cost of furnishing impatient services and all the following conditions apply:

(A) The actual allowable inpatient costs of the hospital in the cost reporting period that would be affected by the revised ceiling exceed the target amount

established under paragraph (c) of this section.

(B) The hospital documents that the higher costs are the result of substantial and permanent changes in furnishing patient care services since the base period.

(C) The exceptions and adjustments described in paragraphs (g) and (h) of this section would not result in recognition of the reasonable and necessary costs of providing inpatient services.

(ii) The revised ceiling will be based on the necessary and proper costs incurred during the new base period. Increases in overhead costs (for example, administrative and general costs and housekeeping costs) will not be taken into consideration unless the hospital documents that these increases result from substantial and permanent changes in furnishing patient care services.

(2) *New base period.* The new base period is the first cost reporting period that is 12 months or longer that reflects the substantial and permanent change.

(3) *New applicable rate of increase percentages.* The revised ceiling resulting from the assignment of a new base period is increased by the applicable rate of increase percentages described in paragraph (c)(3) of this section.

(Catalog of Federal Domestic Assistance Program No. 13.773, Medicare—Hospital Insurance)

Dated: March 23, 1990.

Gail R. Wilensky,

Administrator, Health Care Financing Administration.

Approved: April 11, 1990.

Louis W. Sullivan,

Secretary.

Editorial Note: The following addendum will not appear in the Code of Federal Regulations.

Addendum—Schedule of Standardized Amounts Effective With Discharges on or After April 1, 1990

I. Standardization and Restandardization of Base-year Costs or Target Amounts

Section 1886(d)(2)(A) of the Act required the establishment of base-year cost data containing allowable operating costs per discharge of inpatient hospital services for each hospital. The preamble to the interim final rule, published September 1, 1983 (48 FR 39763), contains a detailed explanation of how base-year cost data were established in the initial development of standardized amounts for the prospective payment system and how they are used in computing the Federal rates.

Section 1886(d)(9)(B)(i) of the Act required that Medicare target amounts be determined for each hospital located in Puerto Rico for its cost reporting period beginning in FY 1987. The September 1, 1987 final rule contains a detailed explanation of how the target amounts were determined and how they are used in computing the Puerto Rico rates (52 FR 33043, 33066).

The standardized amounts are based on per discharge averages of adjusted hospital costs, or for Puerto Rico, adjusted target amounts, from a base period, updated and otherwise adjusted in accordance with the provision of section 1886(d) of the Act. Sections 1886(d)(2)(C) and 1886(d)(9)(B)(ii) of the Act required that the updated base-year per discharge costs and, for Puerto Rico, the updated target amounts, respectively, be standardized in order to remove from the cost data the effects of certain sources of variation in cost among hospitals. These include case mix, differences in area wage levels, cost-of-living adjustments for Alaska and Hawaii, indirect medical education costs, and payments to hospitals serving a disproportionate share of low-income patients.

Since all adjustments for variation in hospital operating costs or target amounts except those for the disproportionate share hospitals have already been accounted for consistent with the construction of the standardized amounts, no revision was made at the hospital level for those factors. Therefore, the discussion below is limited to the impact of the disproportionate share payment provisions in section 6003(c) of Public Law 101–239 on the standardized amounts.

A. Costs for Hospitals That Serve a Disproportionate Share of Low-Income Patients

Before enactment of Public Law 101–239, sections 1886(d)(2)(C)(iv) and 1886(d)(9)(B)(ii)(IV) of the Act provided that, effective with discharges occurring on or after October 1, 1986, and before October 1, 1995, the updated hospital costs and target amounts per case be standardized for the estimated additional payments made to hospitals that serve disproportionate shares of low-income patients. That is, the law requires us to remove the effects of the payments made to disproportionate share hospitals from the costs used to establish the standardized amounts.

The original standardization for the disproportionate share adjustment was discussed in the **Federal Register** in the September 3, 1986 final rule (51 FR 31498). A subsequent restandardization for the disproportionate share adjustment was discussed in the **Federal Register** in the September 30, 1988 final rule (53 FR 38536). Thus, we have consistently interpreted amendments to the disproportionate share hospital provisions to require us to restandardize the base year PPS amounts.

Section 6003(c) of Public Law 101–239 amended section 1886(d) of the Act to provide revised criteria used in classifying a hospital as a "disproportionate share" hospital as well as increases in the applicable payment adjustments effective with discharges occurring on or after April 1, 1990. These changes, which were discussed earlier in this document, will result in higher adjustment factors than were taken into account in standardizing the costs used to establish the standardized amounts. In addition, more hospitals will receive disproportionate share payments under the revised qualifying criteria established by section 6003(c) of Public Law 101–239.

The legislative language in Public Law 101–239 is silent with respect to standardization for the increased payments associated with this provision, and makes no modification to the standardization requirement under sections 1886(d)(2)(C)(iv) and 1886(d)(9)(B)(ii)(IV) of the Act. Restandardization to remove the additional disproportionate share payments would reduce the standardized amounts by approximately 0.6 percent. However, it was Congress' intent in enacting section 6003(c) of Public Law 101–239 that the increased payments to disproportionate share hospitals be funded through additional program expenditures and not from a redistribution of payments to all hospitals. Therefore, in this unique case, the Secretary is using his general exceptions and adjustments authority under section 1886(d)(5)(I) of the Act to implement section 6003(c) without restandardization of the base year prospective payment system amounts. Therefore, no adjustment to the standardized amounts has been made to account for the disproportionate share changes.

B. Other Adjustments to the Average Standardized Amounts

As a result of the changes in the disproportionate share payment provisions and the wage index values applicable to redesignated rural hospitals, it was necessary to recalculate the budget neutrality factors that are required by section 1886(d)(8)(D) of the Act for certain rural

hospitals that are deemed urban under section 1886(d)(8)(B) of the Act. Section 1886(d)(8)(D) of the Act specifies that, in recalculating the budget neutrality factors, two payment conditions must be met. First, the FY 1990 standardized amounts are to be adjusted so as to ensure that total aggregate payments under the prospective payment system after implementation of the provisions of sections 1886(d)(8) (B) and (C) of the Act are equal to the aggregate prospective payments that would have been made absent these provisions. That is, the additional payments to those rural hospitals that have been deemed urban must be financed through a reduction in the urban standardized payment amounts. Second, the rural standardized amounts are to be adjusted so that aggregate payments to those rural hospitals that have not been deemed urban are not changed as a result of these provisions.

The following are the budget neutrality factors that were used to establish the standardized amounts effective for discharges occurring on or after January 1, 1990:

Urban: .999516

Rural: .999244

The budget neutrality factors for the standardized amounts effective for discharges occurring on or after April 1, 1990 are as follows:

Urban: .999133

Rural: .999147

Section 1886(b)(5)(A) of the Act requires that, in addition to the basic prospective payment rates, payments must be made for discharges involving day outliers and may be made for discharges involving cost outliers. Section 1886(d)(3)(B) of the Act correspondingly requires that the urban and rural standardized amounts, respectively, be separately reduced by the proportion or estimated total DRG payments attributable to outlier payments for hospitals located in urban areas and those located in rural areas.

Section 1886(d)(5)(A) of the Act requires that, in addition to the basic prospective payment rates, payments must be made for discharges involving day outliers and may be made for discharges involving cost outliers. Section 1886(d)(3)(B) of the Act correspondingly requires that the urban and rural standardized amounts, respectively, be separately reduced by the proportion of estimated total DRG payments attributable to outlier payments for hospitals located in urban areas and those located in rural areas. Because of the revised payment rules set forth in this document, the outlier adjustment factor for urban hospitals must be revised. The outlier adjustment factor applied to the urban standardized amounts in the December 29, 1989 notice effective for discharges occurring on or after January 1, 1990 was .943622. The outlier adjustment factor applied to the urban standardized amounts to establish the payment rates effective for discharges occurring on or after April 1, 1990 is .943759. The outlier adjustment factor applied to the rural standardized amounts remains at .978500. There is no change in the outlier thresholds. The revised standardized amounts effective for discharges occurring on or after April 1, 1990 are shown in Tables 1a, 1b, and 1c.

II. Tables

This section contains the tables referred to throughout the preamble to this final rule and in this addendum. The tables are as follows:

Table 1a—National Adjusted Standardized Amounts, Labor/Nonlabor

Table 1b—Regional Adjusted Standardized Amounts, Labor/Nonlabor

Table 1c—Adjusted Standardize Amounts for Puerto Rico, Labor/Nonlabor

Table 2a—Wage Index for Rural Counties Whose Hospitals Are Deemed Urban—Using Urban Area Wage Index

Table 2b—Wage Index for Rural Counties Whose Hospitals Are Deemed Urban—Computed as Separate Urban Areas

Table 2c—Wage Index for Rural Counties Whose Hospitals are Deemed Urban—Using Statewide Rural Wage Index

Table 3d—Hospital Case Mix Indexes for Cost Reporting Periods Beginning in FY 1987

TABLE 1A—NATIONAL ADJUSTED STANDARDIZED AMOUNTS, LABOR/NONLABOR

Large urban		Other urban		Rural	
Labor-related	Nonlabor-related	Labor-related	Nonlabor-related	Labor-related	Nonlabor-related
2507.57	888.18	2467.88	874.11	2433.05	673.86

TABLE 1B—REGIONAL ADJUSTED STANDARDIZED AMOUNTS, LABOR/NONLABOR

	Large urban		Other urban		Rural	
	Labor-related	Nonlabor-related	Labor-related	Nonlabor-related	Labor-related	Nonlabor-related
1. New England (CT, ME, MA, NH, RI, VT)	2633.24	927.12	2591.55	912.44	2696.96	799.40
2. Middle Atlantic (PA, NJ, NY)	2365.74	879.79	2328.28	865.86	2562.89	755.72
3. South Atlantic (DE, DC, FL, GA, MD, NC, SC, VA, WV)	2525.31	810.62	2485.32	797.78	2469.05	655.31
4. East North Central (IL, IN, MI, OH, WI)	2663.61	959.08	2621.44	943.90	2500.26	728.33
5. East South Central (AL, KY, MS, TN)	2423.64	733.99	2385.26	722.37	2447.07	611.08
6. West North Central (IA, KS, MN, MO, NB, ND, SD)	2526.01	873.90	2486.02	860.06	2378.46	652.85
7. West South Central (AR, LA, OK, TX)	2511.46	805.12	2471.70	792.37	2281.04	600.39
8. Mountain (AZ, CO, ID, MT, NV, NM, UT, WY)	2421.90	863.14	2383.55	849.48	2319.01	695.06
9. Pacific (AK, CA, HI, OR, WA)	2356.62	965.11	2319.31	969.50	2243.50	777.93

TABLE 1c—ADJUSTED STANDARDIZED AMOUNTS FOR PUERTO RICO, LABOR/NONLABOR

	Large urban		Other urban		Rural	
	Labor-related	Non-labor-related	Labor-related	Non-labor-related	Labor-related	Non-labor-related
Puerto Rico	2,227.36	398.48	2,192.12	392.16	1,626.27	301.04
National	2,474.28	828.84				

TABLE 2a—FOR RURAL COUNTIES WHOSE HOSPITALS ARE DEEMED URBAN—USING URBAN AREA WAGE INDEX

County	Urban area	Wage index
Macoupin, IL	St. Louis, MO–IL	1.0126
Mason, IL	Peoria, IL	0.9794
Clinton, IN	Lafayette, IN	0.8843
Allegan, MI	Grand Rapids, MI.	1.0076
Ionia, MI	Lansing-East Lansing, MI.	1.0360
Shiawassee, MI	Flint, MI	1.1653
Tuscola, MI	Saginaw-Bay City-Midland, MI.	1.0769
Clinton, MO	Kansas City, KS–MO.	1.0093
Van Wert, OH	Lima, OH	0.9178
Cherokee, SC	Greenville-Spartanburg, SC.	0.9322
Bedford, VA	Roanoke, VA	0.8224
Fredericksburg City, VA.	Washington, DC–MD–VA.	1.0827
Jefferson, WI	Milwaukee, WI	1.0132
Walworth, WI	Milwaukee, WI	1.0132

TABLE 2a—FOR RURAL COUNTIES WHOSE HOSPITALS ARE DEEMED URBAN—USING URBAN AREA WAGE INDEX—Continued

County	Urban area	Wage index
Jefferson, WV	Washington, DC–MD–VA.	1.0827

TABLE 2b—WAGE INDEX FOR RURAL COUNTIES WHOSE HOSPITALS ARE DEEMED URBAN—COMPUTED AS SEPARATE URBAN AREAS

County	Urban area	Wage index
Limestone, AL	Huntsville, AL	0.7455
Marshall, AL	Huntsville, AL	0.7207
Charlotte, FL	Sarasota, FL	0.8311
Indian River, FL	Fort Pierce, FL	0.8613
Lenawee, MI	Ann Arbor, MI	1.1580
Henry, IN	Anderson, IN	0.8411
Columbiana, OH	Beaver County, PA.	0.9089

TABLE 2c—WAGE INDEX FOR RURAL COUNTIES WHOSE HOSPITALS ARE DEEMED URBAN—USING STATEWIDE RURAL WAGE INDEX

County	Urban area	Wage index
Christian, IL	Springfield, IL	0.7994
Jefferson, KS	Topeka, KS	0.7908
Barry, MI	Battle Creek, MI	0.9110
Cass, MI	Benton Harbor, MI.	0.9110
Van Buren, MI	Kalamazoo, MI	0.9110
Harnett, NC	Fayetteville, NC	0.7639
Genesee, NY	Rochester, NY	0.8069
Morrow, OH	Mansfield, OH	0.8568
Lawrence, PA	Beaver County, PA.	0.8760

BILLING CODE 4120-03-M

TABLE 3D : HOSPITAL CASE MIX INDEXES FOR COST REPORTING PERIODS BEGINNING IN FY1987 PAGE 1 OF 23

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
010001	01.2303	010059	00.9728	010122	00.9859	030012	01.1173	030091	00.8891
010004	00.9804	010060	00.9780	010123	01.2290	030013	01.1313	040001	01.0745
010005	01.1483	010061	00.9705	010124	01.2337	030014	01.3012	040002	01.0376
010006	01.1902	010062	00.9521	010125	00.9995	030016	01.1248	040003	00.9615
010007	00.9555	010064	01.4703	010126	01.0113	030017	01.2760	040004	01.2781
010008	00.9980	010065	01.0600	010127	01.3143	030018	01.3697	040005	01.0513
010009	01.1159	010066	00.8766	010128	00.9728	030019	01.1441	040006	01.0050
010010	00.9988	010067	00.9141	010129	01.0580	030020	01.3221	040007	01.4125
010011	01.3136	010068	01.1427	010130	01.0711	030022	01.2805	040008	01.0603
010012	01.2834	010069	01.0807	010131	01.2697	030023	01.2200	040009	00.9670
010015	01.1685	010072	01.1015	010133	00.9524	030024	01.4378	040010	01.1450
010016	01.1967	010073	00.9370	010134	00.9251	030025	01.1606	040011	00.9131
010018	00.9431	010074	00.9355	010136	00.9590	030027	01.0507	040013	01.0284
010019	01.1208	010075	01.0463	010137	01.2073	030030	01.5190	040014	01.1532
010020	00.9880	010078	01.2155	010138	00.9859	030033	01.2513	040015	01.1700
010021	01.0576	010079	01.0404	010139	01.4737	030034	01.1397	040016	01.3322
010022	00.9933	010080	00.9825	010142	00.9081	030035	01.1499	040017	01.1625
010023	01.2091	010081	01.5230	010143	01.0883	030036	01.1471	040018	01.1341
010024	01.2683	010083	01.0427	010144	01.1554	030037	01.6508	040019	01.2155
010025	01.1879	010084	01.3104	010145	01.1882	030038	01.4318	040020	01.3809
010026	00.9560	010085	01.2715	010146	01.0004	030040	01.0377	040021	00.9835
010027	01.0802	010086	01.0295	010148	01.0215	030041	00.9448	040022	01.4739
010028	01.0019	010087	01.2701	010149	01.3243	030043	01.0507	040024	00.9635
010029	01.2071	010089	01.0315	010150	01.0222	030044	01.0837	040025	00.9396
010030	00.9384	010090	01.3211	010152	01.1775	030046	00.9806	040026	01.2716
010031	01.2162	010091	01.0421	020001	01.3987	030047	01.0106	040027	01.1752
010032	00.9144	010092	01.2911	020002	01.0684	030049	01.0338	040028	01.0765
010033	01.7402	010094	01.1690	020004	01.0592	030051	01.1402	040029	01.0829
010034	01.0878	010095	01.0129	020005	00.9437	030054	00.9508	040030	00.9355
010035	01.0620	010096	00.9109	020006	01.0897	030055	01.1076	040031	00.9786
010036	01.0634	010097	01.0149	020007	00.8905	030057	01.2368	040032	00.9913
010038	01.0752	010098	01.0921	020008	01.0416	030059	01.3926	040033	00.8291
010039	01.5440	010099	01.0141	020009	00.8357	030060	01.2147	040035	00.9430
010040	01.1549	010100	01.1863	020010	00.8207	030061	01.3363	040036	01.1709
010041	00.8123	010101	01.0750	020011	00.9515	030062	01.1943	040037	01.0494
010043	00.9736	010102	00.9074	020012	01.3105	030063	01.1885	040039	00.9627
010044	00.9272	010103	01.4942	020013	00.9551	030064	01.3923	040040	00.9542
010045	01.0055	010104	01.5097	020014	01.0397	030065	01.3897	040041	01.1634
010046	01.2041	010108	01.1128	020017	01.2549	030067	00.9668	040042	01.2096
010047	00.9784	010109	01.0678	020024	01.0375	030068	01.0592	040043	00.9501
010049	01.0568	010110	00.9166	020025	00.9126	030069	01.2270	040044	00.9349
010050	00.9876	010112	01.0374	030001	01.1696	030080	01.4060	040045	00.9433
010051	00.8947	010113	01.3614	030002	01.4721	030081	00.9616	040047	01.0036
010052	01.0084	010114	01.2269	030003	01.2665	030082	00.6432	040048	01.1016
010053	01.0077	010115	00.9933	030006	01.3662	030083	01.2121	040050	01.0417
010054	01.1362	010117	00.9478	030007	01.2062	030085	01.0859	040051	00.9092
010055	01.2562	010118	01.1535	030008	01.5802	030086	01.1665	040053	01.0082
010056	01.1895	010119	01.1528	030009	01.2713	030087	01.1565	040054	01.0835
010057	01.1121	010120	00.9522	030010	01.3510	030088	01.2178	040055	01.2635
010058	01.0629	010121	01.0880	030011	01.2725	030089	01.1598	040058	00.9258

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
040060	01.0163	050011	01.1673	050074	00.9600	050133	01.1756	050197	01.7187
040062	01.1563	050013	01.9811	050075	01.2224	050134	01.2552	050199	01.2038
040063	01.2898	050014	01.1132	050076	01.4461	050135	01.4892	050201	01.0241
040064	00.9858	050015	01.2735	050077	01.4275	050136	01.2275	050202	01.1739
040066	00.9559	050016	01.1241	050078	01.1903	050137	01.1655	050204	01.4023
040067	01.0313	050017	01.6257	050079	01.3338	050138	01.4055	050205	01.1207
040069	01.0259	050018	01.1795	050080	01.1350	050139	01.2175	050207	01.1929
040070	00.9564	050019	00.9577	050081	01.5174	050140	01.2074	050208	01.1757
040071	01.2071	050021	01.2268	050082	01.3053	050141	01.2111	050211	01.2740
040072	01.0278	050022	01.3428	050084	01.3818	050143	01.2164	050212	01.0717
040074	01.0931	050024	01.1669	050086	01.1688	050144	01.3063	050213	01.2331
040075	01.1316	050025	01.4895	050087	01.2994	050145	01.2382	050214	01.3504
040076	00.9417	050026	01.4886	050088	01.0669	050146	01.2326	050215	01.3200
040077	00.9220	050028	01.2325	050089	01.2746	050147	00.9713	050217	01.1495
040078	01.2105	050029	01.2454	050090	01.2524	050148	01.1263	050219	01.3946
040080	01.0070	050030	01.1584	050091	01.1411	050149	01.1649	050220	01.1526
040081	00.8798	050032	01.1422	050092	01.0904	050150	01.2194	050221	01.3692
040082	01.1146	050033	01.3103	050093	01.4597	050151	01.2441	050222	01.2007
040084	01.0380	050034	01.1922	050096	01.1596	050152	01.2968	050224	01.3825
040085	01.0353	050036	01.4272	050097	01.2711	050153	01.5227	050225	01.1841
040087	00.9734	050038	01.2448	050098	00.9771	050154	01.2297	050226	01.4205
040088	01.1097	050039	01.4653	050099	01.3463	050155	01.1628	050228	01.2552
040090	00.9236	050040	01.1257	050100	01.6869	050159	01.1951	050229	01.2479
040091	01.1029	050041	01.1488	050101	01.2559	050161	01.3398	050230	01.2442
040093	01.0071	050042	01.2037	050102	01.2742	050164	01.3376	050231	01.3867
040095	00.9284	050043	01.5298	050103	01.3903	050166	01.2234	050232	01.6133
040098	01.1442	050045	01.1461	050104	01.3137	050167	01.2914	050233	01.1458
040100	01.0659	050046	01.2087	050107	01.2487	050168	01.4548	050234	01.1818
040105	01.0046	050047	01.5321	050108	01.3207	050169	01.3660	050235	01.3162
040106	01.0402	050049	01.2544	050109	01.6870	050170	01.3642	050236	01.2111
040107	01.0593	050051	01.1397	050110	01.1018	050172	01.1806	050238	01.2311
040108	00.9089	050052	01.1311	050111	01.2166	050173	01.3701	050239	01.2896
040109	01.1994	050053	01.2275	050112	01.3171	050174	01.4917	050240	01.2935
040114	01.6259	050054	01.1915	050113	01.1782	050175	01.2216	050241	01.1726
040115	01.0099	050055	01.1732	050114	01.3706	050177	01.3134	050242	01.3192
040116	01.2129	050056	01.2043	050115	01.3702	050179	01.1820	050243	01.2612
040118	01.0561	050057	01.2634	050116	01.3744	050180	01.3497	050245	01.5119
040119	01.1365	050058	01.2937	050117	01.1897	050181	01.2812	050248	01.1282
040122	01.0235	050060	01.3303	050118	01.1655	050183	01.2017	050251	01.0442
040123	00.9088	050061	01.2054	050119	00.8513	050186	01.3342	050253	01.2018
040124	00.9968	050063	01.3387	050121	01.1095	050187	01.0120	050254	01.1496
040126	00.9544	050065	01.3251	050122	01.4064	050188	01.3395	050256	01.5480
040128	00.8931	050066	01.1875	050124	01.2625	050189	00.9871	050257	01.3812
040130	01.0329	050067	01.1975	050125	01.1733	050190	01.1292	050258	01.3379
050002	01.1814	050068	01.1105	050126	01.2690	050191	01.3721	050260	00.9152
050004	01.1625	050069	01.4305	050127	01.2521	050192	01.0290	050261	01.1385
050006	01.2505	050070	01.1619	050128	01.4059	050193	01.3248	050262	01.5063
050007	01.3759	050071	01.1589	050129	01.5073	050194	01.2460	050263	01.2427
050008	01.3086	050072	01.2380	050131	01.1911	050195	01.2863	050264	01.3235
050009	01.3812	050073	01.1614	050132	01.2108	050196	01.1507	050267	01.4286

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

TABLE 3D : HOSPITAL CASE MIX INDEXES FOR COST REPORTING PERIODS BEGINNING IN FY1987 PAGE 3 OF 23

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
050268	01.1973	050342	01.2607	050418	01.1140	050489	01.0857	050575	01.1144
050269	01.1730	050343	01.1341	050419	01.1196	050491	01.3280	050576	01.1348
050270	01.2255	050345	01.2760	050420	01.2259	050492	01.2216	050577	01.2482
050272	01.2424	050348	01.3109	050421	01.2400	050494	01.1126	050578	01.1958
050274	00.9832	050349	01.0065	050423	01.0839	050496	01.5751	050579	01.3391
050276	01.0771	050350	01.3110	050424	01.5724	050497	00.9871	050580	01.1025
050277	01.2672	050351	01.3838	050425	01.2051	050498	01.2042	050581	01.2864
050278	01.3214	050352	01.1153	050426	01.2389	050502	01.6642	050583	01.7187
050279	01.1484	050353	01.6283	050427	00.9808	050503	01.2911	050584	01.2881
050280	01.2157	050355	00.9325	050430	00.9041	050506	01.2815	050585	01.2558
050281	01.2698	050357	01.4549	050431	01.1346	050510	01.1431	050586	01.1042
050282	01.2229	050359	01.0685	050432	01.3782	050512	01.1339	050587	01.2356
050283	01.2775	050360	01.2303	050433	01.0084	050515	01.2823	050588	01.1920
050286	01.0184	050361	00.9285	050434	01.0676	050516	01.3117	050589	01.3208
050289	01.6257	050362	00.9364	050435	01.1229	050517	01.1422	050590	01.2274
050290	01.3782	050363	01.2532	050436	01.0841	050522	01.2945	050591	01.2051
050291	01.1496	050366	01.1626	050438	01.3712	050523	01.1246	050592	01.2751
050292	01.1506	050367	01.2053	050440	01.1282	050526	01.2170	050593	01.1219
050293	00.8705	050369	01.2019	050441	01.6062	050527	01.3084	050594	01.9893
050295	01.3247	050371	01.1529	050442	01.1539	050528	01.1911	050597	01.1467
050296	01.1340	050372	01.0812	050443	00.9242	050530	01.2092	050598	01.1989
050298	01.0888	050373	01.1041	050444	01.1995	050531	01.2114	050599	01.3661
050299	01.2954	050376	01.3069	050446	00.9065	050534	01.2730	050601	01.1837
050300	01.2426	050377	01.0307	050447	01.3330	050535	01.2931	050603	01.3987
050301	01.2073	050378	01.1290	050448	00.9896	050537	01.2109	050604	01.2306
050302	01.2644	050379	01.0173	050449	01.2475	050539	01.2548	050605	01.0531
050305	01.3314	050380	01.5528	050450	00.9696	050541	01.3889	050607	01.1690
050307	01.3517	050381	00.9604	050451	01.0616	050542	01.1122	050608	01.1081
050308	01.4919	050382	01.2920	050454	01.6541	050543	01.1712	050609	01.2501
050309	01.2355	050383	01.0783	050455	01.4949	050544	01.1853	050613	01.0652
050310	01.0868	050385	01.2194	050456	01.3140	050545	00.7699	050615	01.1724
050312	01.5490	050387	00.9738	050457	01.4664	050546	01.0702	050616	01.1226
050313	01.1031	050388	00.8907	050458	00.6621	050547	00.8858	050618	01.0205
050315	01.3363	050390	01.2510	050459	01.2505	050549	01.4092	050619	01.2578
050317	01.2076	050391	01.1606	050464	01.8514	050550	01.2937	050622	01.1743
050318	00.9539	050392	00.9591	050467	01.1716	050551	01.3040	050623	01.3144
050319	01.2402	050393	01.3599	050468	01.3147	050552	01.1402	050624	01.2040
050320	01.1810	050394	01.3549	050469	00.9653	050557	01.2169	050625	01.3861
050324	01.5811	050395	01.1511	050470	01.0734	050559	01.3443	050630	01.0370
050325	01.2368	050396	01.3887	050471	01.6207	050560	01.1477	050633	01.2073
050326	01.2467	050397	01.0401	050473	01.2315	050561	01.0897	050635	01.2346
050327	01.5174	050401	01.2446	050476	01.2875	050564	01.1882	050636	01.2364
050328	01.2536	050404	01.0917	050477	01.2107	050565	01.1613	050637	01.2004
050329	01.2081	050406	00.9874	050478	01.1228	050566	00.9891	050638	00.9612
050331	01.2880	050407	01.1961	050481	01.3617	050567	01.2986	050641	01.0461
050333	01.0829	050410	01.0504	050482	01.0037	050568	01.2619	050644	01.1368
050334	01.2894	050411	01.2182	050483	01.2186	050569	01.2171	050649	01.2249
050335	01.1085	050413	01.2905	050485	01.4148	050570	01.4718	050650	01.2548
050336	01.2418	050414	01.1535	050486	01.3124	050571	01.2528	050651	01.2089
050337	01.1282	050417	01.1451	050488	01.2218	050573	01.3912	050657	01.0945

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
050660	00.9051	060038	01.1324	070005	01.3086	100002	01.2902	100056	01.1014
050661	01.0188	060039	01.0956	070006	01.1879	100004	01.1065	100057	01.2080
050662	00.7996	060041	00.9220	070007	01.2315	100005	01.0523	100059	01.4736
050663	01.1083	060042	00.9792	070008	01.1554	100006	01.3937	100060	01.4297
050666	00.9511	060043	01.0489	070009	01.1745	100007	01.6641	100061	01.3040
050667	01.1880	060044	01.1931	070010	01.4008	100008	01.3887	100062	01.2058
050668	01.2804	060045	01.0161	070011	01.2679	100009	01.3550	100063	01.1993
050669	00.8036	060046	01.0878	070012	01.1571	100010	01.2392	100065	01.1064
050671	00.9507	060047	01.1740	070013	01.1884	100011	00.9923	100067	01.3165
050672	00.6649	060049	01.1022	070014	01.1782	100012	01.2607	100068	01.1631
050674	01.2236	060050	01.2085	070015	01.1983	100013	00.9392	100069	01.2344
050675	01.2198	060051	01.2924	070016	01.2355	100014	01.1584	100070	01.3140
050676	00.9623	060052	00.8945	070017	01.2683	100015	01.2542	100071	01.2646
050677	01.2153	060053	00.8779	070018	01.2024	100016	01.0397	100072	01.1639
050678	01.1723	060054	01.2284	070019	01.1743	100017	01.2621	100073	01.5656
050679	01.1212	060056	00.9593	070020	01.2555	100018	01.2586	100074	01.1481
060001	01.4113	060057	01.2828	070021	01.2112	100019	01.2660	100075	01.5470
060003	01.1920	060058	00.9625	070022	01.5722	100020	01.2132	100076	01.1224
060004	01.0702	060060	01.1077	070023	01.1991	100021	01.2112	100077	01.2298
060005	01.4955	060062	00.9996	070024	01.1979	100022	01.4082	100078	01.0838
060006	01.2115	060063	01.0829	070025	01.5119	100023	01.1866	100079	01.2043
060007	01.1742	060064	01.2450	070026	01.1350	100024	01.1828	100080	01.2355
060008	01.1945	060065	01.2229	070027	01 2396	100025	01.4299	100081	01.0334
060009	01.2266	060066	01.0598	070028	01.3376	100026	01.3468	100082	01.2815
060010	01.4881	060067	00.9947	070029	01.2103	100027	00.9987	100083	01.1208
060011	01.2049	060068	01.2037	070030	01.1439	100028	01.1528	100084	01.3139
060012	01.3790	060070	01.1662	070031	01.2634	100029	01.2452	100085	01.1766
060013	01.2452	060071	01.2618	070033	01 1911	100030	01.0680	100086	01.2272
060014	01.4873	060072	00.9541	070034	01.2294	100032	01.2914	100087	01.5396
060015	01.3366	060073	00.9038	070035	01.2924	100033	01.3007	100088	01.3083
060016	01.2218	060074	01.0998	070036	01.2718	100034	01.3630	100089	01.1677
060017	01.2335	060075	01.1552	080001	01.3971	100035	01.2069	100090	01.1305
060018	01.1574	060076	01.2487	080002	01.1551	100036	01.2456	100092	01.1492
060019	01.2302	060077	00.9978	080003	01.2382	100038	01.4269	100093	01.2637
060020	01.3392	060083	00.9694	080004	01.2357	100039	01.3381	100098	00.9940
060022	01.5079	060085	00.9096	080005	01.1121	100040	01.3606	100099	01.1602
060023	01.3198	060087	01.2401	080006	01.1324	100042	01.1514	100100	01.1808
060024	01.4020	060088	01.0908	080007	01.1781	100043	01.2506	100102	01.0276
060026	01.3689	060090	01.0086	090001	01.3532	100044	01.2312	100103	00.9594
060027	01.2459	060092	00.9596	090002	01.1139	100045	01.2419	100105	01.1795
060028	01.3601	060093	01.0792	090003	01 3762	100046	01.1694	100106	01.0923
060029	00.9697	060096	01.1732	090004	01.4421	100047	01.1811	100107	01.1429
060030	01.2074	060097	01 0195	090005	01 2457	100048	00.9719	100108	01.0115
060031	01.3787	060098	01 1919	090006	01.2166	100049	01.1628	100109	01.1721
060032	01.3431	060099	00 8867	090007	01.0917	100050	01.0991	100110	01.3585
060033	01.2087	060101	01 7209	090008	01.1657	100051	01.0810	100112	00.9422
060034	01.2245	070001	01.6643	090009	01 2080	100052	01.2662	100113	01.6225
060035	01 1540	070002	01 5316	090010	01.0311	100053	01.1505	100114	01.2458
060036	01.1418	070003	01 2228	090011	01.5708	100054	01.3158	100115	01.1403
060037	00.9882	070004	01 1497	100001	01 2676	100055	01.1837	100117	01.1953

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

TABLE 3D : HOSPITAL CASE MIX INDEXES FOR COST REPORTING PERIODS BEGINNING IN FY1987 PAGE 5 OF 23

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
100118	01.1457	100181	01.0954	100246	01.1981	110032	01.1343	110092	01.0448
100120	01.1857	100183	01.1659	100248	01.4588	110033	01.2277	110093	01.0239
100121	01.0869	100185	01.0599	100249	01.2113	110034	01.2733	110094	00.9829
100122	01.1333	100186	01.3218	100252	01.1784	110035	01.1700	110095	01.2200
100124	01.1573	100187	01.1883	100253	01.2395	110036	01.4767	110096	01.0168
100125	01.1749	100189	01.2005	100254	01.2393	110037	01.0861	110097	01.0186
100126	01.2873	100191	01.2395	100255	01.2257	110038	01.2015	110098	00.9192
100127	01.3277	100194	01.2265	100256	01.2770	110039	01.1582	110099	00.9000
100128	02.0691	100195	01.1535	100258	01.3928	110040	00.9417	110100	01.0617
100129	01.2022	100196	01.2297	100259	01.1088	110041	01.1648	110101	00.9883
100130	01.1706	100199	01.2868	100260	01.1862	110042	01.0128	110103	00.9040
100131	01.2361	100200	01.2824	100262	01.2252	110044	01.1216	110104	01.0694
100132	01.2327	100203	01.2201	100263	01.1519	110045	01.0361	110105	01.1456
100134	00.9263	100204	01.4072	100264	01.2823	110046	01.1534	110107	01.4233
100135	01.4296	100206	01.1634	100265	01.1614	110047	00.9275	110108	00.9253
100137	01.1571	100207	01.2588	100266	01.1219	110048	01.0795	110109	00.9714
100139	01.1429	100208	01.2736	100267	01.1999	110049	00.9246	110111	01.0056
100140	01.0638	100209	01.3032	100268	01.2240	110050	01.0026	110112	00.9524
100142	01.0616	100210	01.4842	100269	01.1919	110051	00.9389	110113	00.9592
100143	01.0323	100211	01.2754	100271	01.4270	110052	00.8999	110114	01.0842
100144	01.0469	100212	01.3342	100273	01.0626	110054	01.1805	110115	01.3453
100145	01.2219	100213	01.3365	100275	01.1592	110055	00.9394	110117	00.9338
100146	01.0329	100214	01.2881	100276	01.2628	110056	00.9197	110118	00.9396
100147	01.0232	100217	01.1305	100277	01.0870	110059	01.0530	110120	00.9518
100149	01.1775	100218	01.1309	110001	01.0980	110061	00.8640	110121	00.9486
100150	01.2251	100219	01.2389	110002	01.2026	110062	00.9565	110122	01.1641
100151	01.5323	100220	01.5442	110003	01.1656	110063	01.0082	110123	00.9696
100152	01.1704	100221	01.6707	110004	01.2332	110064	01.1948	110124	01.0397
100154	01.3440	100222	01.1433	110005	01.1774	110065	01.0754	110125	01.1040
100156	01.0630	100223	01.3247	110006	01.1724	110066	01.2334	110127	00.9783
100157	01.3461	100224	01.1842	110007	01.3844	110069	01.0705	110128	01.1587
100159	01 0176	100225	01.2257	110008	01.0547	110070	00.9412	110129	01.3445
100160	01 1208	100226	01.1952	110009	01.0308	110071	00.9645	110130	00.9550
100161	01.3038	100227	01.0190	110010	01.8212	110072	00.9367	110131	00.9877
100162	01.2292	100228	01.1903	110011	01.1360	110073	01.0459	110132	01.0735
100164	00.9971	100229	01.3813	110013	01.0010	110074	01.1972	110133	00.9475
100165	00.9713	100230	01.1690	110014	01.1406	110075	01.0785	110134	00.8712
100166	01.2743	100231	01.4848	110015	01.0698	110076	01.2580	110135	01.0284
100167	01.1714	100232	01.0618	110017	00.9313	110077	00.9645	110136	01.1340
100168	01.2940	100234	01.2788	110018	01.1052	110078	01.4444	110140	00.9145
100169	01.5028	100235	01.2883	110020	01.1665	110079	01.0886	110141	00.9183
100170	01.2027	100236	01.2802	110023	01.1266	110080	01.0432	110142	01.1130
100172	01.2413	100237	01.7054	110024	01.2114	110081	00.9936	110143	01.1818
100173	01.1983	100238	01.3480	110025	01.1622	110083	01.1899	110144	01.1434
100174	01.4030	100239	01.3643	110026	01.0732	110085	01.1514	110149	01.0456
100175	01.0779	100240	00.7533	110027	01.0180	110086	01.1371	110150	01.0877
100176	01.6684	100241	01.0497	110028	01.3738	110087	01.1871	110151	00.9891
100177	01.1725	100242	01.1910	110029	01.1424	110088	00.8301	110152	00.9264
100179	01.4299	100243	01.2758	110030	01.1342	110089	01.1108	110153	01.0044
100180	01.3872	100244	01.2370	110031	01.1261	110091	01.1804	110154	00.9801

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
110155	00.9654	120010	01.4207	130048	00.9966	140053	01.5240	140113	01.4268
110156	00.9153	120011	01.2831	130049	01.2339	140054	01.3135	140114	01.1229
110157	01.1048	120012	01.0282	130050	00.8292	140055	01.0019	140115	01.1216
110158	01.0427	120014	01.1472	130051	01.0504	140058	01.0668	140116	01.2376
110161	01.2204	120015	00.7754	130054	00.9275	140059	01.0530	140117	01.1879
110162	00.8765	120016	01.0456	130056	00.9525	140061	01.1255	140118	01.3527
110163	01.2249	120018	00.8238	140001	01.2411	140062	01.1829	140119	01.4659
110164	01.2574	120019	01.0428	140002	01.2232	140063	01.2280	140120	01.1205
110165	01.1376	120021	00.8272	140003	00.9912	140064	01.1662	140121	01.0149
110166	01.2080	120022	01.4610	140004	01.0438	140065	01.2024	140122	01.2330
110168	01.3112	120024	00.9841	140005	00.9001	140066	01.0949	140123	01.1222
110169	00.6938	130001	01.0237	140007	01.1677	140067	01.4681	140125	01.1084
110170	00.8820	130002	01.2581	140008	01.2511	140068	01.1666	140126	01.4368
110171	01.1668	130003	01.2378	140010	01.2887	140069	01.0488	140127	01.1379
110172	01.0926	130005	01.2643	140011	01.0430	140070	01.2551	140128	01.0026
110174	00.9689	130006	01.5218	140012	01.2234	140072	01.1500	140129	01.0287
110175	00.9364	130007	01.3767	140013	01.2269	140074	01.0865	140130	01.1413
110176	01.0872	130008	00.8736	140014	01.0547	140075	01.2848	140131	01.1256
110177	01.3482	130009	00.9129	140015	01.1327	140077	01.0052	140132	01.2864
110178	01.0393	130010	00.9777	140016	00.9870	140079	01.1816	140133	01.2180
110179	01.1062	130011	01.2602	140017	01.2581	140080	01.5770	140134	01.2479
110181	01.0430	130012	00.9313	140018	01.2919	140081	01.0730	140135	01.1307
110183	01.1226	130013	01.1897	140019	00.9311	140082	01.1928	140136	01.0116
110184	01.0802	130014	01.2111	140023	01.1567	140083	01.1690	140137	01.0783
110185	01.0675	130015	00.9976	140024	00.9681	140084	01.1715	140138	01.1731
110186	01.0541	130016	00.9088	140025	01.0770	140085	01.1633	140139	01.0780
110187	01.0389	130017	00.9841	140026	01.1203	140086	01.0839	140140	01.0466
110188	01.2110	130018	01.2031	140027	01.1248	140087	01.2153	140141	00.9957
110189	00.9833	130019	01.1315	140029	01.2438	140088	01.5052	140142	01.1074
110190	01.0834	130021	00.9368	140030	01.3452	140089	01.1385	140143	01.0848
110191	01.2173	130022	01.1564	140031	01.0619	140090	01.2492	140144	01.0911
110192	01.2927	130024	01.1772	140032	01.1360	140091	01.3241	140145	01.1598
110193	01.0301	130025	01.0105	140033	01.1315	140093	01.1335	140146	00.9817
110194	00.9787	130026	01.0605	140034	01.0886	140094	01.1239	140147	01.0549
110195	00.9655	130027	00.9176	140035	01.0820	140095	01.3362	140148	01.3619
110196	01.3017	130028	01.1873	140036	01.0716	140097	01.0842	140150	01.2936
110198	01.1812	130029	01.1054	140037	01.0620	140098	01.1685	140151	01.0561
110200	01.4294	130030	00.9395	140038	01.0952	140099	01.1103	140152	01.0503
110201	01.2029	130031	01.1108	140039	00.9529	140100	01.3607	140154	01.1204
110202	00.9754	130032	00.9666	140040	01.1931	140101	01.0887	140155	01.0909
110203	00.9353	130034	00.8969	140041	01.0735	140102	01.0357	140156	01.1966
120001	01.4915	130035	01.0602	140042	00.9886	140103	01.1231	140157	01.0244
120002	01.0614	130036	01.1554	140043	01.1338	140104	01.1078	140158	01.2230
120003	01.0372	130037	01.0669	140045	01.0241	140105	01.1932	140159	01.1870
120004	01.2340	130038	00.8879	140046	01.1395	140107	00.9386	140160	01.2639
120005	01.1116	130039	01.1208	140047	01.0601	140108	01.1546	140161	01.0196
120006	01.1475	130040	00.9849	140048	01.1191	140109	00.9779	140162	01.1787
120007	01.5138	130043	01.0255	140049	01.2605	140110	01.1593	140164	01.1815
120008	01.0513	130044	00.9566	140051	01.1902	140111	01.0058	140165	01.0331
120009	00.9469	130045	00.9727	140052	01.2274	140112	01.1206	140166	01.1494

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

TABLE 3D : HOSPITAL CASE MIX INDEXES FOR COST REPORTING PERIODS BEGINNING IN FY1987 PAGE 7 OF 23

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
140167	01.0702	140232	00.9934	150012	01.3614	150067	01.0081	150129	01.1703
140168	01.0554	140233	01.4465	150013	01.0483	150069	01.1423	150130	01.1551
140170	01.0092	140234	01.2042	150014	01.2242	150070	01.0392	150132	01.3112
140171	00.9598	140235	00.9868	150015	01.1254	150071	01.1487	150133	01.1691
140172	01.3782	140236	00.9697	150017	01.4774	150072	01.2501	150134	01.2970
140173	00.9693	140239	01.3720	150018	01.1586	150073	01.0681	150136	01.0901
140174	01.2550	140240	01.1729	150019	01.2083	150074	01.3812	160001	01.1484
140176	01.1212	140241	00.8966	150020	01.0488	150075	01.1684	160002	01.3172
140177	01.1295	140242	01.2914	150021	01.3946	150076	01.0087	160003	01.0248
140179	01.2378	140243	01.1016	150022	01.0696	150077	01.1274	160004	01.1475
140180	01.2826	140245	01.0055	150023	01.2635	150078	01.0436	160005	01.1556
140181	01.1426	140246	01.0563	150024	01.1237	150079	01.0457	160007	01.1055
140182	01.2568	140247	00.9911	150025	01.3614	150081	01.0184	160008	01.1519
140184	01.1014	140248	01.1118	150026	01.1812	150082	01.3254	160009	01.1063
140185	01.1861	140249	00.8427	150027	01.0504	150083	00.7980	160012	01.0730
140186	01.1058	140250	01.2152	150029	01.1537	150084	01.5492	160013	01.2090
140187	01.3028	140251	01.2348	150030	01.1319	150085	00.9362	160014	01.0236
140188	01.0060	140252	01.2092	150031	01.0050	150086	01.1204	160016	01.2157
140189	01.1215	140253	01.1574	150032	01.6010	150088	01.1491	160018	00.9835
140190	01.0197	140258	01.2640	150033	01.3729	150089	01.1780	160020	01.0597
140191	01.1593	140261	01.1360	150034	01.0951	150090	01.2816	160021	01.0152
140193	00.9731	140271	00.9998	150035	01.1535	150091	01.0715	160023	01.1150
140197	01.2627	140273	01.0922	150036	01.0408	150092	01.0785	160024	01.1701
140199	01.0755	140275	01.0938	150037	01.1741	150094	00.9770	160025	01.5256
140200	01.3528	140276	01.8067	150038	01.1323	150095	01.0639	160026	01.1347
140202	01.1783	140280	01.1405	150039	01.0176	150096	01.0142	160027	01.1097
140203	01.0743	140281	01.3876	150042	01.1548	150097	01.0558	160028	01.1239
140204	01.2221	140285	01.0858	150043	01.1076	150098	01.0551	160029	01.2414
140205	01.0373	140286	01.1591	150044	01.1524	150099	01.2293	160030	01.2464
140206	01.0755	140288	01.4058	150045	01.1345	150100	01.4091	160031	01.0639
140207	01.2015	140289	01.2448	150046	01.2989	150101	01.0211	160032	01.0459
140208	01.3273	140290	01.2333	150047	01.3292	150102	01.0526	160033	01.2436
140209	01.2780	140291	01.1928	150048	01.1600	150103	00.9834	160034	01.0014
140210	00.9988	140292	01.1455	150049	01.0131	150104	01.0924	160035	01.0147
140211	01.1241	140293	00.9685	150050	01.1539	150105	01.0921	160036	01.1877
140212	01.0647	140294	01.0653	150051	01.1968	150106	01.0035	160037	01.0602
140213	01.1608	140295	01.2165	150052	01.0271	150109	01.2255	160038	01.2063
140215	01.1360	140297	01.3156	150053	00.9704	150110	00.9156	160039	01.0041
140216	00.9240	140299	01.0352	150054	01.0411	150111	01.0840	160040	01.2148
140217	01.2721	150001	01.1238	150056	01.4916	150112	01.1433	160041	01.0671
140218	01.0377	150002	01.1427	150057	02.0467	150113	01.0887	160043	00.9978
140219	01.1854	150003	01.3345	150058	01.4064	150114	01.0323	160044	01.2385
140220	01.0952	150004	01.2032	150059	01.0815	150115	01.1933	160045	01.4446
140223	01.3536	150005	01.1351	150060	01.0884	150122	01.0919	160046	01.0303
140224	01.2973	150006	01.1942	150061	01.1111	150123	00.9755	160047	01.2345
140226	00.9572	150007	01.1007	150062	01.0008	150124	01.1354	160048	01.0734
140228	01.4979	150008	01.1921	150063	01.0996	150125	01.2708	160049	00.9223
140229	01.0715	150009	01.1917	150064	01.0582	150126	01.6186	160050	01.0389
140230	00.9651	150010	01.0655	150065	01.1423	150127	01.0862	160051	01.1232
140231	01.2551	150011	01.2057	150066	01.0743	150128	01.1195	160052	01.0874

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
160053	01.1194	160109	01.0218	170017	01.1110	170075	00.8871	170138	01.1514
160054	01.0145	160110	01.3767	170018	01.0559	170076	01.0932	170139	01.0922
160055	01.0021	160111	01.1736	170019	01.2320	170077	00.9406	170140	01.0147
160056	01.0278	160112	01.2072	170020	01.1648	170079	00.9001	170142	01.2121
160057	01.2112	160113	01.0837	170021	01.0253	170080	00.9875	170143	01.1399
160058	01.5236	160114	01.0118	170022	01.1684	170081	01.0371	170144	01.3158
160059	01.2011	160115	01.0843	170023	01.2884	170082	00.9109	170145	01.1098
160060	01.0341	160116	01.0618	170024	00.9986	170084	00.9333	170146	01.2417
160061	01.0779	160117	01.2799	170025	01.1616	170085	01.0235	170147	01.1886
160062	01.0742	160118	01.0829	170026	01.0422	170086	01.4154	170148	01.1994
160063	01.1467	160119	00.9285	170027	01.1653	170087	01.2747	170150	01.0639
160064	01.2377	160120	01.0106	170030	00.9862	170088	01.0015	170151	01.0135
160065	01.0808	160122	01.0794	170031	00.9853	170089	00.8886	170152	00.9415
160066	01.1050	160123	01.1342	170032	01.0427	170090	00.9804	170159	00.9357
160067	01.1781	160124	01.1797	170033	01.1607	170092	01.0157	170160	00.9199
160068	00.9680	160126	01.1353	170034	00.9592	170093	01.0159	170164	01.2130
160069	01.2516	160129	01.0816	170035	00.9494	170094	00.9991	170166	00.9984
160070	00.9806	160130	01.1513	170036	00.9579	170095	01.0692	170168	01.0141
160071	01.2392	160131	01.1442	170037	01.1594	170097	00.9800	170170	01.1448
160072	01.0786	160132	01.1814	170038	01.0192	170098	01.0497	170171	01.1499
160073	00.9302	160133	01.1631	170039	01.0433	170099	01.0681	170172	00.9116
160074	01.1480	160134	00.9778	170040	01.3836	170100	00.8326	170173	01.0012
160075	01.0446	160135	00.8930	170041	01.0058	170101	01.0558	170174	00.9434
160076	00.9331	160138	01.0833	170043	01.0547	170102	00.9820	170175	01.1650
160077	00.9826	160140	01.0679	170044	01.2462	170103	01.2030	170176	01.3471
160079	01.2395	160141	00.9681	170045	01.0567	170104	01.2832	180001	01.1315
160080	01.0502	160142	01.0889	170046	00.9582	170105	01.0534	180002	01.0142
160081	01.0982	160143	00.9960	170049	01.1794	170106	01.0659	180004	01.1004
160082	01.5026	160145	01.0325	170050	01.0328	170108	00.9956	180005	01.0318
160083	01.3920	160146	01.2756	170051	01.0570	170109	01.0572	180006	00.8716
160085	01.1370	160147	01.2826	170052	01.0856	170110	00.9273	180007	01.3058
160086	00.9802	160151	01.0926	170053	00.9818	170112	00.9607	180009	01.0921
160088	01.0575	160152	01.0163	170054	01.1122	170113	01.1084	180010	01.5791
160089	01.1510	160153	01.4763	170055	01.0139	170114	01.1108	180011	00.9873
160090	01.0379	170001	01.1351	170056	00.9852	170115	01.0594	180012	01.1438
160091	01.1580	170002	01.2191	170057	01.0408	170116	01.1397	180013	01.2153
160092	01.0141	170003	01.0991	170058	01.0536	170117	01.0008	180014	01.4561
160093	00.9667	170004	01.0573	170060	00.9964	170119	00.9572	180015	01.0721
160094	01.0974	170005	00.9551	170061	01.0470	170120	01.1571	180016	01.1908
160095	01.1181	170006	01.1756	170062	00.9330	170121	00.8278	180017	01.1843
160097	01.2704	170007	01.1075	170063	00.9324	170122	01.5981	180018	01.1669
160098	01.1139	170008	00.9901	170064	01.0220	170123	01.3707	180019	01.1009
160099	01.0486	170009	01.1239	170066	00.9405	170124	01.0302	180020	01.0346
160101	01.1342	170010	01.0969	170067	01.0305	170125	00.9067	180021	00.9426
160102	01.2998	170011	01.2057	170068	01.1879	170126	00.9448	180023	00.8520
160103	00.9083	170012	01.3577	170069	01.0117	170128	01.0429	180024	00.9728
160104	01.0710	170013	01.2566	170070	00.9585	170131	01.1402	180025	01.1586
160106	01.1541	170014	01.0854	170072	00.9496	170133	01.1845	180026	01.0541
160107	01.0489	170015	01.0811	170073	01.1116	170134	01.0534	180027	01.0540
160108	01.1705	170016	01.4897	170074	01.1139	170137	01.1433	180028	00.9416

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

TABLE 3D : HOSPITAL CASE MIX INDEXES FOR COST REPORTING PERIODS BEGINNING IN FY1987 PAGE 9 OF 23

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
180029	01.1586	180099	00.9614	190023	00.9428	190112	01.2548	190178	00.9494
180030	01.0066	180100	01.1427	190025	01.1152	190113	01.1459	190179	00.9595
180031	01.0222	180101	01.1431	190026	01.2457	190114	00.9694	190180	01.0348
180032	00.9019	180102	01.1990	190027	01.2970	190115	01.2351	190182	01.0364
180033	01.0769	180103	01.4593	190029	01.0964	190116	01.1282	190183	01.0540
180034	01.0263	180104	01.2956	190033	00.9220	190117	01.0271	190184	00.8960
180035	01.2253	180105	00.8795	190034	01.1662	190118	00.9937	190185	01.1802
180036	01.0391	180106	00.8799	190035	01.2919	190119	00.9871	190186	00.9249
180037	01.2129	180108	00.9034	190036	01.4173	190120	00.9719	190187	00.9177
180038	01.1458	180114	00.8942	190037	01.0235	190122	01.1560	190188	00.9909
180040	01.6100	180115	00.9919	190039	01.3691	190124	01.3373	190189	01.1295
180041	01.0107	180116	01.2323	190040	01.3046	190125	01.1820	190190	01.1181
180042	00.9810	180117	00.9893	190041	01.3338	190127	01.0950	190191	01.1371
180043	01.0038	180118	00.9516	190043	01.0396	190128	01.0381	190193	01.1605
180044	01.0056	180120	00.9347	190044	01.0174	190130	00.9370	190194	01.0700
180045	01.1176	180121	01.0156	190045	01.1960	190131	01.1308	190195	01.0331
180046	00.9958	180122	00.9014	190046	01.3159	190132	01.1007	190196	00.9954
180047	00.9792	180123	01.2243	190047	01.1558	190133	01.0263	190197	01.2074
180048	01.1093	180124	01.2287	190048	01.0497	190134	00.8518	190198	01.1043
180049	01.1599	180125	00.9573	190049	01.0581	190135	01.3462	190199	01.3461
180050	01.2292	180126	01.0856	190050	00.9930	190136	00.9694	190200	01.3006
180051	01.2231	180127	01.0875	190053	01.1811	190137	00.9747	190201	01.0277
180053	00.9172	180128	01.1193	190054	01.2859	190138	00.7599	190202	01.1560
180054	01.0628	180129	00.9816	190058	00.9863	190140	00.9805	190203	01.3474
180055	01.0113	180130	01.2852	190059	01.0106	190142	00.9732	190204	01.2926
180056	01.1023	180132	01.2163	190060	01.1729	190144	01.1202	190205	01.1457
180058	00.8773	180133	01.1805	190064	01.3068	190145	00.9363	190206	01.4665
180059	00.9374	180134	01.0958	190065	01.3673	190146	01.3378	190207	01.1207
180060	00.9150	180136	01.2265	190071	01.0157	190147	00.8941	200001	01.2242
180062	00.9135	180137	01.4236	190075	01.2014	190148	00.8697	200002	01.0769
180063	00.9426	180138	01.1401	190077	00.9721	190149	01.0587	200003	00.9571
180064	01.0531	190001	01.0359	190078	01.0750	190151	01.1291	200005	00.8615
180065	00.9399	190002	01.3822	190079	01.1156	190152	01.2309	200006	01.1295
180066	01.0132	190003	01.1238	190081	00.9512	190155	00.9867	200007	01.0226
180067	01.4668	190004	01.1594	190083	00.9144	190156	00.8741	200008	01.2088
180069	01.0248	190005	01.2160	190086	01.1764	190157	00.9168	200009	01.5634
180070	01.0866	190006	01.0889	190088	01.1276	190158	01.1362	200012	01.0847
180072	01.1104	190007	01.0078	190089	01.1196	190160	01.0548	200013	01.1417
180075	00.9306	190008	01.3997	190090	01.1492	190161	01.0368	200015	01.2101
180078	00.9350	190009	01.0861	190092	01.1704	190162	01.2695	200016	01.1048
180079	00.9647	190010	01.0948	190095	00.9299	190164	01.0885	200017	01.2214
180080	01.1368	190011	01.0376	190098	01.2906	190165	00.9877	200018	01.1312
180081	01.2500	190012	01.0593	190099	01.1347	190166	00.8922	200019	01.2601
180085	01.2207	190013	01.1460	190101	00.9311	190167	01.3031	200020	01.1128
180087	01.0013	190014	00.9808	190102	01.2560	190169	00.9879	200021	01.1305
180088	01.3921	190015	01.2091	190103	00.9305	190170	01.0059	200023	00.9741
180092	01.0272	190017	01.1762	190106	01.1519	190173	01.2411	200024	01.1641
180093	01.2462	190018	01.2147	190109	01.0378	190175	01.1593	200025	01.2239
180094	00.9741	190019	01.3477	190110	00.9871	190176	01.4233	200026	01.0017
180095	01.0770	190020	01.0968	190111	01.3291	190177	01.0976	200027	01.0817

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
200028	01.0413	210031	01.5240	220030	01.1000	220094	01.1194	230020	01.2265
200031	01.1661	210032	01.0714	220031	01.5806	220095	01.1094	230021	01.2174
200032	01.2587	210033	01.1003	220033	01.1741	220097	01.1029	230022	01.2184
200033	01.5911	210034	01.1347	220034	01.0773	220098	01.1712	230024	01.4306
200034	01.1953	210035	01.1166	220035	01.0895	220099	01.0936	230027	01.1200
200037	01.1553	210036	01.1164	220036	01.3655	220100	01.2378	230029	01.3116
200038	01.0468	210037	01.1564	220038	01.1272	220101	01.2079	230030	01.2586
200039	01.2610	210038	01.1655	220040	01.2016	220102	00.9454	230031	01.3382
200040	01.0836	210039	01.1111	220041	01.1084	220104	01.1112	230032	01.6930
200041	01.1115	210040	01.2790	220042	01.1030	220105	01.1101	230034	01.0459
200043	00.8092	210043	01.1575	220045	01.1765	220106	01.1178	230035	01.1260
200044	01.1446	210044	01.1601	220046	01.2803	220107	01.0500	230036	01.2543
200047	01.1501	210045	01.0469	220048	01.1214	220108	01.0790	230037	01.0063
200049	00.9632	210046	01.0510	220049	01.1515	220110	01.7746	230038	01.5276
200050	01.1707	210047	01.1714	220050	01.0408	220111	01.1335	230039	01.2921
200051	00.9897	210048	01.1114	220051	01.2077	220114	01.0731	230040	01.1892
200052	01.0626	210049	01.1904	220052	01.1842	220115	01.2915	230041	01.0900
200055	01.0413	210050	00 6864	220053	01.1584	220116	01.7056	230042	01.1157
200058	00.7707	210051	01 1974	220055	01.1650	220117	01.0382	230043	00.8224
200062	01.0623	210052	01.0923	220057	01.1605	220118	01 7723	230046	01.5655
200063	01.2145	210054	01.1493	220058	01 0557	220119	01.2189	230047	01.1365
200066	01 1324	210055	01 1359	220060	01.1215	220120	01.0502	230051	00.9817
210001	01.2344	210056	01 3282	220061	01.2091	220121	01.0464	230053	01.3381
210002	01 5384	210057	01 1467	220062	00 8922	220123	01.0069	230054	01.3812
210003	01 1715	210058	01 7118	220063	01.1057	220126	01.1732	230055	01.0537
210004	01 1782	210059	01 1693	220064	01 1839	220128	01.0822	230056	00.9669
210005	01 2376	220001	01 1826	220065	01.1220	220129	01.1597	230057	01.0083
210006	01 0369	220002	01 3061	220066	01 2285	220131	01.0904	230058	01.0908
210007	01 3958	220003	00 9989	220067	01 2002	220133	00.7624	230059	01.3867
210008	01 1409	220004	01.1511	220068	00 8217	220135	01.1121	230060	01.1135
210009	01 3188	220005	01 1326	220070	01 1432	220153	01 0354	230062	01.0868
210010	01 1331	220006	01 1919	220071	01 6108	220154	00.9250	230063	01.1693
210011	01 2107	220008	01 1777	220072	01 1003	220156	01.1411	230065	01.2263
210012	01 1939	220009	01.1582	220073	01.1578	220162	01 0610	230066	01.1730
210013	01 2529	220010	01 1393	220074	01 0842	220163	01.7642	230067	00.9226
210015	01 1864	220011	01 2007	220075	00 7557	220171	01.3423	230068	01.3015
210016	01 4431	220012	01 2152	220076	01 1624	230001	01 1611	230069	01.1021
210017	01 1146	220015	01 1718	220077	01 4503	230002	01.1419	230070	01.2998
210018	01.1898	220016	01 1514	220079	01 1432	230003	01.1356	230071	00.6860
210019	01 2653	220017	01 1935	220080	01 1438	230004	01.5059	230072	01.1280
210021	01 1635	220019	01 1044	220081	01 0283	230005	01.1524	230075	01.2598
210022	01 1612	220020	01 1386	220082	01 1530	230006	01.0497	230076	01.1764
210023	01 1391	220021	01 1461	220083	01 1802	230007	01.0507	230077	01.7057
210024	01 1883	220022	01 0571	220084	01 1345	230011	01.0940	230078	01.0588
210025	01 1124	220023	01 1731	220086	01 5091	230012	01.0868	230080	01.1634
210026	01 1738	220024	01 1519	220087	00 9251	230013	01.1979	230081	01.1035
210027	01 1955	220025	01 1071	220088	01 3943	230014	01.1010	230082	01.1783
210028	01 0559	220026	01 2203	220089	01 2020	230015	01.1088	230084	01.0553
210029	01 3224	220028	01 2156	220090	01 1118	230017	01 3613	230085	01.1281
210030	01 0478	220029	01 1242	220092	01 1746	230019	01.2612	230086	01.0331

NOTE CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS
CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989

TABLE 3D : HOSPITAL CASE MIX INDEXES FOR COST REPORTING PERIODS BEGINNING IN FY1987 PAGE 11 OF 23

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
230087	01.0791	230149	01.0920	230223	01.2086	240026	01.3128	240087	01.1497
230089	01.2140	230150	01.4965	230224	01.0714	240027	01.0548	240088	01.3980
230090	01.4388	230151	01.2997	230225	01.1401	240028	01.1127	240089	00.9942
230092	01.2571	230153	01.1762	230227	01.1802	240029	01.0869	240090	01.0581
230093	01.1210	230154	01.1120	230228	01.1702	240030	01.3095	240091	01.0452
230095	01.0993	230155	01.0095	230230	01.2863	240031	00.9538	240093	01.2924
230096	01.0877	230156	01.5042	230231	00.9732	240033	00.9676	240094	01.0671
230097	01.2317	230157	01.2483	230232	01.0739	240036	01.2723	240096	01.0524
230098	01.1478	230158	00.9482	230235	00.9736	240037	01.0255	240097	01.0442
230099	01.1145	230159	01.1940	230236	01.2324	240038	01.3651	240098	01.0071
230100	01.1149	230161	00.8807	230237	01.1500	240040	01.1014	240099	01.1460
230101	01.0848	230162	00.9848	230239	01.0733	240041	01.1650	240100	01.2056
230102	01.2025	230163	00.9111	230241	01.0991	240043	01.1785	240101	01.0744
230103	01.0711	230165	01.5596	230244	01.1718	240044	01.0781	240102	00.9428
230104	01.3573	230167	01.1937	230253	01.0813	240045	01.0647	240103	01.0506
230105	01.3748	230169	01.1659	230254	01.1780	240046	01.2716	240104	01.1933
230106	01.0901	230171	01.1674	230256	01.0891	240047	01.2669	240105	00.9691
230107	00.9918	230172	01.1207	230257	00.9820	240048	01.2443	240106	01.2408
230108	01.1303	230173	01.1468	230259	01.0784	240049	01.5971	240107	01.0629
230110	01.1912	230174	01.1711	230264	01.3228	240050	01.1137	240108	01.0190
230111	00.9732	230175	00.9071	230265	01.0565	240051	00.9542	240109	01.0052
230113	00.9482	230176	01.1337	230266	01.1158	240052	01.1960	240110	01.0776
230114	00.8872	230178	01.0894	230269	01.1505	240053	01.3716	240111	01.0248
230115	00.9558	230179	00.9313	230270	01.1908	240056	01.3257	240112	01.0743
230116	00.9107	230180	01.0786	230273	01.2843	240057	01.5934	240114	01.0047
230117	01.7438	230181	01.0807	230276	00.8097	240058	00.9848	240115	01.2480
230118	01.1982	230184	01.1212	230277	01.1197	240059	01.0460	240116	00.9559
230119	01.0291	230186	01.0785	240001	01.3606	240061	01.4090	240117	01.1252
230120	01.0564	230188	01.0668	240002	01.5005	240062	01.1555	240118	00.9854
230121	01.1596	230189	00.9580	240003	01.1525	240063	01.3179	240119	00.9005
230122	01.2099	230190	01.0402	240004	01.3368	240064	01.1884	240121	00.9589
230124	01.0818	230191	00.9033	240005	00.9426	240065	00.9563	240122	01.0973
230125	01.2936	230193	01.1751	240006	01.1794	240066	01.2423	240123	01.0657
230128	01.3004	230194	01.1366	240007	01.0843	240069	01.0612	240124	01.0458
230129	01.6825	230195	01.2569	240008	01.0491	240071	01.1043	240125	01.0589
230130	01.3299	230197	01.0968	240009	01.1521	240072	01.0185	240127	01.0307
230132	01.2617	230198	01.1679	240010	01.8533	240073	00.9891	240128	01.0572
230133	01.1705	230201	01.0440	240011	01.0230	240074	01.0562	240129	00.9366
230134	01.0835	230204	01.2327	240013	01.2600	240075	01.1514	240130	01.0429
230135	01.1814	230205	01.1591	240014	01.0831	240076	01.1800	240131	01.2833
230137	01.0588	230207	01.1411	240016	01.2776	240077	01.0135	240132	01.2384
230138	00.8890	230208	01.3302	240017	01.1816	240078	01.3235	240133	01.1181
230140	01.0945	230211	00.9362	240018	01.2016	240079	01.0926	240134	01.0501
230141	01.3518	230212	01.0950	240019	01.4049	240080	01.2293	240136	01.0058
230142	01.1449	230213	01.0257	240020	01.1465	240081	01.2955	240137	01.0851
230143	01.2824	230216	01.2639	240021	01.0254	240082	01.3120	240138	00.9734
230144	01.1429	230217	01.1521	240022	01.1078	240083	01.2575	240139	01.0662
230145	01.1410	230219	00.9067	240023	01.0484	240084	01.2570	240140	00.8723
230146	01.1319	230221	01.2010	240024	01.1208	240085	00.9004	240141	01.0238
230147	01.2447	230222	01.1831	240025	01.1713	240086	01.0921	240142	01.2206

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
240143	00.9912	250012	00.9273	250073	00.9423	250137	00.8628	260052	01.1551
240144	01.0081	250014	01.0045	250075	00.9433	250138	01.0284	260053	01.0870
240145	01.0019	250015	01.0159	250076	00.9045	250139	00.9145	260054	01.2222
240146	00.9930	250016	00.8628	250077	00.9051	250140	00.8755	260055	01.0630
240148	00.9501	250017	00.9005	250078	01.2181	260001	01.4340	260056	01.1122
240150	00.9869	250018	01.0146	250079	00.8556	260002	01.3375	260057	01.0542
240152	01.0220	250019	01.1509	250081	01.1209	260003	01.0349	260058	01.1941
240153	01.0368	250020	00.9693	250082	01.1043	260004	01.0497	260059	00.9919
240154	00.9686	250021	00.9090	250083	00.8746	260005	01.1939	260061	01.1092
240155	00.9858	250023	00.8992	250084	01.1070	260006	01.2691	260062	01.1395
240156	00.9618	250024	00.9321	250085	00.9771	260007	01.1687	260063	01.1545
240157	01.1274	250025	00.9833	250086	01.0194	260008	01.2411	260064	01.2272
240158	01.1935	250026	00.8558	250088	01.0448	260009	01.1738	260065	01.4152
240160	01.0044	250027	00.9438	250089	01.0016	260010	01.1677	260066	01.0312
240161	01.0317	250029	00.8852	250091	00.9088	260011	01.2576	260067	01.0490
240162	01.1279	250030	00.9071	250093	01.1221	260012	00.9328	260068	01.7320
240163	01.0240	250031	01.1171	250094	01.1322	260013	01.1247	260070	01.0309
240165	00.9607	250032	01.1692	250095	01.0299	260014	01.4240	260073	01.0118
240166	01.1417	250033	00.9084	250096	01.1049	260015	01.0474	260074	01.1148
240167	00.9017	250034	01.3188	250097	01.0780	260016	01.1003	260077	01.2563
240169	00.9443	250035	00.9125	250098	00.8920	260017	01.2288	260078	01.0583
240170	01.0958	250036	00.9572	250099	01.0801	260018	00.9995	260079	01.0233
240171	01.0809	250037	00.9479	250100	01.1586	260019	00.9974	260080	01.1676
240172	01.0532	250038	00.9158	250101	00.8895	260020	01.4032	260081	01.4210
240173	01.0078	250039	00.9318	250102	01.3658	260021	01.2517	260082	01.1620
240175	00.8993	250040	01.0673	250104	01.1697	260022	01.3765	260085	01.3544
240176	00.8596	250042	01.0452	250105	00.8789	260023	01.2244	260086	01.0274
240177	01.0684	250043	00.8623	250107	00.9231	260024	01.0583	260088	01.1599
240179	01.0464	250044	01.0092	250109	00.8959	260025	01.1855	260089	01.0848
240180	01.0218	250045	01.0533	250110	00.9324	260026	01.0422	260090	01.2996
240183	01.1786	250046	00.9721	250111	00.8397	260027	01.3377	260091	01.4352
240184	01.0042	250047	00.8864	250112	00.9273	260029	01.1340	260092	01.0096
240187	01.1608	250048	01.2611	250113	00.9354	260030	01.1440	260093	01.0597
240192	00.9418	250049	00.9202	250114	00.8516	260031	01.3602	260094	01.1039
240193	00.9429	250050	01.1600	250117	00.9623	260032	01.4510	260095	01.2957
240196	01.3765	250051	00.8500	250118	01.0504	260033	01.2928	260096	01.3333
240200	00.9361	250057	01.0358	250119	00.9296	260034	01.0639	260097	01.1522
240201	01.0210	250058	01.0773	250120	01.0615	260035	00.9834	260100	01.1008
240207	01.1862	250059	01.0004	250121	00.9602	260036	01.0613	260102	01.0554
240210	01.2955	250060	00.8165	250122	01.1993	260037	01.2415	260103	01.2042
250001	01.3791	250061	00.9927	250123	01.1109	260039	01.2658	260104	01.4094
250002	00.8609	250062	01.0416	250124	00.8891	260040	01.3348	260105	01.7396
250003	00.8786	250063	00.9072	250125	01.0524	260041	01.0590	260107	01.2457
250004	01.2593	250065	01.0152	250126	00.9770	260042	01.1540	260108	01.5593
250005	00.9911	250066	00.9068	250128	01.0579	260044	01.1035	260109	00.9835
250006	00.9529	250067	01.0799	250129	01.0424	260047	01.1818	260110	01.4035
250007	01.0321	250068	00.8624	250131	01.0021	260048	01.1554	260111	01.0736
250008	00.8651	250069	01.1203	250132	00.9932	260049	00.9341	260112	01.3148
250009	01.0931	250071	01.0072	250133	00.8569	260050	01.0212	260113	01.1223
250010	01.0148	250072	01.1222	250134	01.0132	260051	01.0778	260115	01.0767

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. CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

TABLE 3D : HOSPITAL CASE MIX INDEXES FOR COST REPORTING PERIODS BEGINNING IN FY1987 PAGE 13 OF 23

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
260116	01.1430	270004	01.6625	270073	01.0244	280055	00.9958	280122	00.5067
260118	01.2451	270006	00.8845	270079	00.9506	280056	01.1050	290001	01.3778
260119	01.2422	270007	00.9627	270080	01.1401	280057	01.0551	290002	00.9762
260120	01.1454	270008	00.9363	270081	00.9518	280058	01.1387	290003	01.5105
260122	01.0553	270009	00.9995	270082	00.8982	280060	01.3170	290005	01.2205
260123	01.0007	270011	01.0975	270083	01.0722	280061	01.2777	290006	01.0306
260127	01.0295	270012	01.3620	280001	01.1084	280062	01.1250	290007	01.4606
260128	01.0648	270013	01.1548	280003	01.6649	280064	01.0915	290008	01.2197
260129	01.0793	270014	01.4380	280004	01.1393	280065	01.2414	290009	01.2920
260131	01.2475	270016	00.8973	280005	01.3801	280066	01.1335	290010	01.0822
260134	01.1056	270017	01.2475	280009	01.3143	280068	00.9104	290011	01.0415
260137	01.1734	270018	01.0156	280010	01.1475	280070	01.0210	290012	01.2065
260138	01.5596	270019	00.9260	280011	01.0272	280071	00.9497	290013	00.9549
260141	01.7046	270021	01.1128	280012	01.2409	280073	00.9954	290014	00.9711
260142	01.1765	270023	01.3066	280013	01.4791	280074	01.1065	290015	00.9165
260143	01.3462	270024	00.9325	280014	01.1328	280075	01.0871	290016	01.0507
260146	01.0092	270026	00.9341	280015	01.0289	280076	01.0047	290018	00.8192
260147	01.0156	270027	01.0717	280017	01.2278	280077	01.3137	290019	01.1323
260148	00.9096	270028	01.0253	280018	01.0186	280078	01.0647	290020	00.9161
260158	01.1813	270029	00.9887	280020	01.3601	280079	00.9240	290021	01.4112
260159	01.0140	270030	00.9383	280021	01.3793	280080	01.0296	290022	01.4946
260160	01.1576	270031	00.8965	280022	01.0764	280081	01.3291	290027	01.0346
260162	01.2053	270032	01.1098	280023	01.2702	280082	00.9169	290031	01.0115
260163	01.1448	270033	00.8677	280024	00.8928	280083	01.0219	290032	01.2212
260164	01.0677	270035	01.0164	280025	01.0498	280084	00.9911	290033	01.0437
260165	00.9847	270036	00.9629	280026	01.0304	280085	01.2450	300001	01.2352
260166	01.1787	270039	01.0723	280028	00.9248	280088	01.4897	300002	01.0816
260172	01.1124	270040	01.0800	280029	01.0137	280089	00.9986	300003	01.5878
260173	01.1686	270041	00.9687	280030	01.5165	280090	01.0121	300005	01.2267
260175	01.1589	270042	01.1630	280031	01.0382	280091	01.0674	300006	01.0530
260176	01.3369	270043	00.8183	280032	01.2002	280092	00.9139	300007	01.0457
260177	01.2982	270044	01.0497	280033	00.9992	280093	00.9158	300008	01.1262
260178	01.2752	270046	00.9439	280034	01.2722	280094	01.0376	300009	01.1950
260179	01.3668	270047	00.8434	280035	01.0035	280097	00.8741	300010	01.2180
260180	01.3547	270048	01.0087	280037	01.0851	280098	01.0021	300011	01.1918
260182	01.0545	270049	01.2801	280038	01.1854	280101	01.0655	300012	01.1945
260183	01.2727	270050	00.9665	280039	01.0150	280102	01.0543	300013	01.0625
260186	01.1102	270051	01.0767	280040	01.4682	280103	00.8920	300014	01.2168
260188	01.1698	270052	00.9028	280041	01.0981	280104	01.0076	300015	01.0737
260189	00.9924	270053	00.7952	280042	01.1273	280105	01.1736	300016	01.1676
260190	01.1317	270055	00.8111	280043	01.0398	280106	01.1097	300017	01.1881
260191	01.1798	270057	01.1639	280045	01.0674	280107	01.0661	300018	01.1999
260192	00.7967	270058	00.9615	280046	01.1560	280108	01.0454	300019	01.1450
260193	01.1808	270059	00.9644	280047	01.1384	280109	00.9380	300020	01.1050
260195	01.0480	270060	00.8575	280048	01.0302	280110	01.0913	300021	01.0893
260197	01.1440	270063	00.9200	280049	01.0891	280111	01.1890	300022	01.1218
260200	01.1025	270067	00.9362	280050	01.0080	280114	00.9572	300023	01.1678
270001	00.9084	270068	00.8914	280051	01.0656	280115	01.0861	300024	01.1553
270002	01.0460	270071	00.9122	280052	01.1090	280117	01.1919	300028	01.1186
270003	01.0885	270072	00.9470	280054	01.1529	280118	01.1628	300029	01.2416

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
300033	01.0041	310058	01.0549	320010	01.2212	330022	01.0086	330092	01.0171
300034	01.4557	310059	00.8795	320011	01.0436	330023	01.2056	330094	01.2128
310001	01.4248	310060	01.1843	320012	00.9911	330024	01.4789	330095	01.1482
310002	01.6940	310061	01.1234	320013	01.0016	330025	01.0338	330096	01.0324
310003	01.1234	310062	01.0568	320014	00.8993	330027	01.2269	330097	01.0855
310005	01.1586	310063	01.2395	320016	01.0515	330028	01.1811	330100	00.6224
310006	01.1528	310064	01.1957	320017	01.1823	330029	01.2245	330101	01.4885
310008	01.2239	310067	01.1463	320018	01.1893	330030	00.9796	330102	01.1848
310009	01.1318	310068	01.1807	320019	01.2438	330033	01.2644	330103	01.1583
310010	01.2015	310069	01.1107	320021	01.5681	330034	01.1423	330104	01.1941
310011	01.1826	310070	01.1995	320022	01.2463	330035	01.0567	330106	01.4784
310012	01.2631	310071	01.1644	320023	01.0641	330037	01.1100	330107	01.1516
310013	01.2232	310072	01.1671	320030	01.0203	330038	01.0979	330108	01.2179
310014	01.4201	310073	01.1790	320031	00.9155	330039	01.0271	330110	00.9785
310015	01.2591	310074	01.2318	320032	00.9684	330041	01.2350	330111	01.0827
310016	01.1472	310076	01.2434	320033	01.1338	330043	01.1384	330114	00.9990
310017	01.2575	310077	01.4991	320035	00.9550	330044	01.2083	330115	01.1234
310018	01.0780	310078	01.1875	320037	01.2026	330045	01.1895	330116	00.9831
310019	01.4535	310081	01.1429	320038	01.1550	330046	01.2850	330118	01.3471
310020	01.1505	310083	01.1227	320046	01.0297	330047	01.1474	330119	01.2138
310021	01.1910	310084	01.1677	320048	01.0639	330048	01.1731	330121	01.0084
310022	01.1814	310085	01.2039	320051	00.9949	330049	01.2496	330122	01.1184
310024	01.1997	310086	01.1747	320053	01.0221	330050	01.0717	330125	01.4887
310025	01.0928	310087	01.1570	320063	01.2510	330052	01.1768	330126	01.0879
310026	01.1452	310088	01.1445	320065	01.1249	330053	01.0456	330132	01.0782
310027	01.1814	310090	01.2154	320068	00.9936	330055	01.2461	330133	01.1863
310028	01.1071	310091	01.1652	320069	01.0987	330056	01.2238	330135	01.1110
310029	01.6091	310092	01.1907	320071	00.9227	330057	01.3084	330136	01.2473
310031	02.1063	310093	01.0932	320072	02.4145	330058	01.1295	330140	01.4891
310032	01.1304	310094	01.0973	320074	01.0751	330059	01.3454	330141	01.1753
310033	01.1577	310096	01.3424	320076	01.1303	330061	01.2031	330142	01.1745
310034	01.1554	310105	01.1010	320077	00.9003	330062	01.0073	330144	01.0111
310036	01.1503	310108	01.1737	330001	01.1586	330064	01.1935	330148	01.0386
310038	01.3908	310110	01.1399	330002	01.2178	330065	01.1801	330151	01.0808
310039	01.1789	310111	01.1763	330003	01.2487	330066	01.1387	330152	01.2167
310040	01.0752	310112	01.1261	330004	01.1793	330067	01.2302	330153	01.2545
310041	01.2112	310113	01.2071	330005	01.4311	330072	01.2157	330154	01.3056
310042	01.0883	310115	01.1733	330006	01.2440	330073	01.1134	330155	01.1674
310043	01.1692	310116	01.2072	330007	01.1838	330074	01.1089	330157	01.1812
310044	01.1923	310118	01.1616	330008	01.1208	330075	01.0236	330158	01.2006
310045	01.1462	310119	01.2760	330009	01.0338	330076	01.1269	330159	01.2806
310047	01.2722	310120	01.0781	330010	01.1335	330078	01.2415	330160	01.1912
310048	01.1972	310121	01.0467	330011	01.1285	330079	01.1772	330161	01.0381
310049	01.1755	320001	01.3382	330012	01.3668	330082	01.1335	330162	01.2580
310050	01.1293	320002	01.2178	330013	01.7798	330084	00.9818	330163	01.1155
310051	01.2526	320003	01.2205	330014	01.1691	330085	01.3105	330164	01.3086
310052	01.1897	320004	01.1158	330015	01.2404	330086	01.1439	330165	01.0774
310054	01.2589	320005	01.1816	330016	01.0472	330088	01.1842	330166	01.0413
310056	01.1396	320006	01.1443	330019	01.0911	330090	01.5243	330167	01.3680
310057	01.2319	320009	01.2327	330020	01.0007	330091	01.1728	330168	01.0565

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

TABLE 3D : HOSPITAL CASE MIX INDEXES FOR COST REPORTING PERIODS BEGINNING IN FY1987 PAGE 15 OF 23

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
330169	01.1737	330241	01.6410	330338	01.1043	340030	01.6746	340099	01.1506
330171	01.2239	330242	01.1976	330339	00.9634	340031	01.1313	340100	01.1842
330174	00.9773	330244	01.0351	330340	01.0658	340032	01.3390	340104	01.0185
330175	01.0585	330245	01.2214	330345	00.8202	340034	01.3018	340105	01.2493
330176	00.9089	330246	01.2058	330350	01.6303	340035	01.0973	340106	01.0354
330177	01.0828	330247	00.6170	330351	01.0762	340036	01.0495	340107	01.2542
330179	00.9729	330249	01.1816	330353	01.1230	340037	01.2133	340109	01.2197
330180	01.2112	330250	01.1446	330354	00.9969	340038	01.2049	340111	01.2191
330181	01.1827	330252	00.8898	330357	01.2088	340039	01.1473	340112	00.9957
330182	02.0469	330254	00.9643	330359	00.9834	340040	01.5338	340113	01.7528
330183	01.2743	330256	00.9298	330372	01.1283	340041	01.1853	340114	01.2376
330184	01.1874	330257	01.0251	330381	01.1012	340042	01.1359	340115	01.3028
330185	01.1132	330258	01.1678	330386	01.1184	340044	00.9984	340116	01.4395
330186	01.1131	330259	01.1874	330387	00.8924	340045	01.0724	340119	01.1598
330188	01.1248	330261	01.1834	330389	01.7418	340047	01.6001	340120	01.0955
330189	00.7565	330263	00.9654	330390	01.0985	340049	00.6621	340121	01.0049
330191	01.1798	330264	01.0845	330391	01.5366	340050	01.1246	340122	01.0463
330193	01.2799	330265	01.2293	330393	01.4851	340051	01.2668	340123	01.1531
330194	01.3844	330267	01.1564	330394	01.1918	340052	00.9703	340124	01.0276
330195	01.4346	330268	01.1667	330395	01.2249	340053	01.4101	340125	01.3775
330197	01.0624	330270	01.7985	330397	01.2579	340054	00.9761	340126	01.2078
330198	01.1926	330272	00.9990	330398	01.1170	340055	01.2410	340127	01.1724
330201	01.2818	330273	01.1289	330399	01.1922	340060	01.0911	340129	01.1178
330203	01.2513	330275	01.1430	340001	01.2074	340061	01.5442	340130	01.1998
330205	01.0961	330276	01.1809	340002	01.5423	340063	01.0984	340131	01.2655
330208	01.1540	330277	01.0692	340003	01.1642	340064	01.0576	340132	01.2293
330209	01.1684	330279	01.1746	340004	01.3083	340065	01.1268	340133	01.1348
330210	01.0997	330281	00.8137	340005	01.1466	340067	00.9981	340135	00.9964
330211	01.1244	330285	01.3226	340006	01.0516	340068	01.1766	340136	00.8738
330212	01.0830	330286	01.1566	340007	01.1651	340069	01.6091	340137	01.0884
330213	01.0316	330288	01.0077	340008	01.0713	340070	01.2475	340138	01.1463
330214	01.5619	330290	01.4490	340010	01.3101	340071	01.0491	340141	01.2672
330215	01.1548	330291	01.0793	340011	01.0290	340072	01.0956	340142	01.1732
330217	01.0601	330293	01.0856	340012	01.1050	340073	01.2255	340143	01.3221
330218	01.1617	330297	01.0904	340013	01.1770	340075	01.1378	340144	01.1495
330219	01.2934	330304	01.1693	340014	01.4227	340076	01.0900	340145	01.1289
330221	01.1604	330306	01.2156	340015	01.2298	340079	00.9262	340146	00.9848
330222	01.1379	330307	01.0954	340016	01.1370	340080	01.0275	340147	01.2283
330223	01.0691	330308	01.1250	340017	01.1663	340084	01.0784	340148	01.2565
330224	01.1455	330309	01.1391	340018	01.3011	340085	01.2408	340151	01.0414
330225	01.1715	330314	01.1928	340019	01.1591	340087	01.0500	340153	01.9130
330226	01.1755	330315	01.0919	340020	01.1982	340088	01.1253	340154	00.8298
330229	01.1517	330316	01.2117	340021	01.2396	340089	00.9801	340155	01.3427
330230	01.2671	330320	01.1119	340022	01.1237	340090	01.1230	340157	01.2151
330232	01.1658	330327	00.9499	340023	01.1851	340091	01.4821	340158	01.0870
330233	01.2021	330331	01.0870	340024	01.1513	340093	01.0672	340159	01.1053
330235	01.1504	330332	01.0974	340025	01.1202	340094	01.2387	340160	01.0540
330236	01.2550	330333	01.1314	340026	00.9916	340096	01.1086	340162	01.1583
330238	01.0712	330335	01.1075	340027	01.1426	340097	01.0059	340164	01.2359
330239	01.1178	330336	01.0993	340028	01.2462	340098	01.5437	340166	01.2237

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
340167	00.7341	350061	01.0185	360053	01.1718	360107	01.1074	360165	01.0721
350001	01.0143	350065	00.9453	360054	01.2158	360108	01.0957	360166	00.9805
350002	01.4223	350067	00.8445	360055	01.1906	360109	01.0351	360167	00.8700
350003	01.1784	360001	01.1466	360056	01.1369	360110	00.7045	360168	00.9495
350004	01.5753	360002	01.1609	360057	01.0055	360112	01.3625	360169	00.9813
350005	01.1872	360003	01.2966	360058	01.1187	360113	01.1744	360170	01.0994
350006	01.1772	360006	01.5374	360059	01.2360	360114	01.0165	360171	01.1111
350007	00.9455	360007	01.0203	360061	00.8351	360115	01.1302	360172	01.2103
350008	00.9182	360008	01.1633	360062	01.4306	360116	01.0288	360174	01.1025
350009	01.1580	360009	01.1828	360063	01.0233	360118	01.2239	360175	01.1157
350010	01.1052	360010	01.1029	360064	01.3204	360119	01.0736	360176	01.1416
350011	01.5033	360011	01.2706	360065	01.1994	360121	01.0745	360177	01.0688
350012	00.9595	360012	01.2519	360066	01.1250	360122	01.1573	360178	01.1858
350013	00.9725	360013	01.1033	360067	01.1307	360123	01.1310	360179	01.1612
350014	00.9805	360014	01.1891	360068	01.2941	360124	01.2528	360180	01.8687
350015	01.5076	360015	01.3556	360069	01.0211	360125	01.0943	360184	01.0612
350016	01.0944	360016	01.2595	360070	01.2123	360126	01.1948	360185	01.2029
350017	01.2157	360017	01.4070	360071	01.1904	360127	00.9821	360186	00.9509
350018	00.9300	360018	01.2812	360072	01.1491	360128	01.1093	360187	01.1956
350019	01.3133	360019	01.1631	360074	01.2068	360129	01.0062	360188	01.0823
350020	01.2224	360020	01.1570	360075	01.3060	360130	01.0795	360189	01.1292
350021	01.0836	360021	01.1822	360076	01.1695	360131	01.1377	360192	01.2282
350023	00.9263	360022	01.1537	360077	01.2801	360132	01.1267	360193	01.1847
350024	00.9675	360024	01.1130	360078	01.1784	360133	01.2760	360194	01.0983
350025	01.0137	360025	01.1127	360079	01.5094	360134	01.3252	360195	01.1742
350027	01.0048	360026	01.0928	360080	01.1676	360135	01.0806	360197	01.0837
350029	00.8877	360027	01.3704	360081	01.1971	360136	00.9974	360200	01.1097
350030	01.0642	360028	01.1760	360082	01.2077	360137	01.4077	360203	01.0927
350031	01.0348	360029	01.0927	360083	01.0993	360139	01.1249	360204	01.0819
350032	01.1959	360030	01.0700	360084	01.3003	360140	01.0259	360210	01.1288
350033	00.9059	360031	01.1348	360085	01.4953	360141	01.2733	360211	01.0924
350034	00.9666	360032	01.1522	360086	01.1444	360142	01.0562	360212	01.2796
350035	00.8309	360034	01.1103	360087	01.1904	360143	01.1498	360213	01.1037
350036	00.9445	360035	01.3692	360088	01.0306	360144	01.2051	360218	01.2271
350038	00.9413	360036	01.1391	360089	01.0911	360145	01.2830	360230	01.2265
350039	00.9025	360037	01.5444	360090	01.2094	360147	01.1599	360231	01.1112
350041	00.9684	360038	01.2511	360091	01.2254	360148	01.1316	360232	01.1059
350042	01.0059	360039	01.1472	360092	01.1304	360149	01.0496	360234	01.1758
350043	01.1419	360040	01.1459	360093	01.0761	360150	01.1640	360236	01.1056
350044	00.8968	360041	01.1600	360094	01.0943	360151	01.1964	360238	01.0093
350047	00.9978	360042	01.0909	360095	01.2167	360152	01.2798	360239	01.1733
350048	00.9661	360044	01.1516	360096	01.0847	360153	01.0912	360240	01.9546
350049	01.0206	360045	01.3337	360098	01.2319	360154	01.0891	370001	01.5093
350050	00.9451	360046	01.0328	360099	01.0909	360155	01.1160	370002	01.0356
350051	00.8560	360047	01.0478	360100	01.1913	360156	01.0977	370004	01.0887
350053	00.9424	360048	01.3987	360101	01.3283	360159	01.1298	370005	00.9543
350055	00.8648	360049	01.1317	360102	01.1987	360161	01.2265	370006	01.1591
350056	00.9321	360050	01.1008	360103	01.2351	360162	01.0967	370007	01.1558
350058	00.9717	360051	01.3457	360104	01.0093	360163	01.4442	370008	01.1872
350060	00.9304	360052	01.4114	360106	01.0975	360164	01.1544	370011	00.9344

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

TABLE 3D : HOSPITAL CASE MIX INDEXES FOR COST REPORTING PERIODS BEGINNING IN FY1987 PAGE 17 OF 23

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
370012	00.9415	370079	00.9362	370159	01.1757	380043	00.9815	390014	00.9855
370013	01.3430	370080	01.0308	370161	01.0365	380044	01.0528	390015	01.1294
370015	01.1228	370082	00.9469	370163	00.8992	380045	01.1510	390016	01.1085
370016	01.2224	370083	01.0252	370165	01.0479	380047	01.3747	390017	01.0659
370017	00.9583	370084	00.9332	370166	01.0031	380048	00.9349	390018	01.1858
370018	01.2137	370085	00.9421	370168	00.8790	380050	01.2065	390019	01.0637
370019	01.0539	370086	01.0468	370169	01.0451	380051	01.2564	390020	01.1541
370020	01.1482	370089	01.2203	370176	01.1231	380052	01.1990	390021	01.0572
370021	01.0051	370091	01.4219	370177	00.9453	380055	01.1722	390022	01.1230
370022	01.1761	370092	00.9650	370178	00.9919	380056	00.9833	390023	01.1985
370023	01.1468	370093	01.4365	370179	00.9713	380059	01.0025	390024	00.7180
370025	01.2234	370094	01.1738	370182	00.9462	380060	01.2595	390025	00.8565
370026	01.2644	370095	01.0093	370183	01.0589	380061	01.4031	390026	01.2064
370028	01.4528	370096	00.9989	370184	01.2499	380062	00.8565	390027	01.5285
370029	01.2204	370097	01.2445	380001	01.3786	380063	01.1160	390028	01.5788
370030	01.1780	370099	00.9762	380002	01.1629	380064	01.2567	390029	01.4828
370032	01.2201	370100	01.0226	380003	01.1437	380065	01.0734	390030	01.1207
370033	01.0536	370103	01.0593	380004	01.6233	380066	01.1715	390031	01.1604
370034	01.1111	370105	01.8384	380005	01.1306	380068	01.0939	390032	01.1706
370035	01.3676	370106	01.2500	380006	01.1631	380069	01.0662	390034	01.0873
370036	01.0747	370107	01.0027	380007	01.4470	380070	01.0148	390035	01.2899
370037	01.5240	370108	01.0498	380008	01.1110	380071	01.2243	390036	01.2435
370038	00.9384	370109	00.8910	380009	01.5651	380072	00.8680	390037	01.2026
370039	01.1237	370110	00.9755	380010	01.1736	380075	01.2214	390039	01.1032
370040	01.0747	370112	00.9691	380011	01.0343	380077	00.9557	390040	01.0491
370041	01.0117	370113	01.1474	380013	01.0515	380078	01.1079	390041	01.1351
370042	00.8814	370114	01.4130	380014	01.1487	380079	01.1806	390042	01.1916
370043	00.9473	370117	01.0631	380016	00.9259	380081	00.9713	390043	01.0505
370045	01.0766	370121	01.1255	380017	01.5552	380082	01.2104	390044	01.4219
370046	01.0585	370122	00.9166	380018	01.4891	380083	01.1262	390045	01.2382
370047	01.1087	370123	01.1277	380019	01.2593	380084	01.3678	390046	01.3563
370048	01.0037	370125	00.9769	380020	01.2627	380087	01.0079	390047	01.3886
370049	01.1410	370126	01.0063	380021	01.1925	380088	01.1439	390048	01.1428
370050	00.9523	370130	01.0025	380022	01.1803	380089	01.2385	390049	01.3331
370051	01.0003	370131	00.9207	380023	01.2380	380090	01.3123	390050	01.7141
370054	01.0963	370133	00.9952	380024	01.2303	380091	01.2305	390051	01.9470
370056	01.2253	370136	00.9975	380025	01.3004	380094	01.1538	390052	01.0758
370057	01.1423	370138	01.0317	380026	01.1667	390001	01.1983	390054	01.1688
370059	01.1549	370139	01.0429	380027	01.2689	390002	01.2264	390055	01.4846
370060	01.0011	370140	01.0155	380029	01.0369	390003	01.0960	390056	01.1064
370061	00.9175	370141	01.3346	380030	00.9756	390004	01.2407	390057	01.2373
370063	01.1100	370144	01.2033	380031	00.9681	390005	01.0528	390058	01 2628
370064	00.9962	370146	00.9797	380033	01.5034	390006	01.4772	390059	01.3544
370065	01.1517	370148	01.2202	380035	01.2671	390007	01.1398	390060	01.1708
370069	01.0429	370149	01.2093	380036	01.0818	390008	01.1727	390061	01.2204
370071	00.9030	370153	01.0890	380037	01.1662	390009	01.3396	390062	01.0947
370072	01.0005	370154	00.9799	380038	01.2102	390010	01.1006	390063	01.4640
370076	01.0944	370156	01.0044	380039	01.2151	390011	01.1834	390064	01.2997
370077	01.1490	370157	00.9893	380040	01.1152	390012	01.2048	390065	01.1665
370078	01.3671	370158	01.0441	380042	01.0503	390013	01.1793	390066	01.2153

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
390067	01.4670	390127	01.1297	390186	01.0910	390260	01.2380	400112	01.1933
390068	01.2593	390128	01.1201	390187	01.1366	390261	01.6842	400113	01.0460
390069	01.1721	390130	01.0114	390188	01.0788	390262	01.3830	400114	01.0291
390070	01.1342	390131	01.2098	390189	01.0637	390263	01.3927	400115	01.0058
390071	01.1071	390132	01.0500	390191	01.1077	390265	01.2558	400116	01.1609
390072	01.0002	390133	01.3365	390192	01.0532	390266	01.1475	400117	01.1185
390073	01.1726	390135	01.2430	390193	01.1638	390267	01.1476	400118	01.0272
390074	01.1868	390136	01.1765	390194	01.0484	390268	01.1249	400119	01.1342
390075	01.2468	390137	01.1017	390195	01.3639	390270	01.1942	410001	01.1522
390076	01.1900	390138	01.2483	390196	01.1388	390272	01.1090	410002	01.0749
390077	01.2941	390139	01.4303	390197	01.2413	390275	00.6165	410004	01.2074
390078	01.0749	390143	00.9148	390198	01.1989	390276	00.8717	410005	01.2686
390079	01.6120	390145	01.1769	390199	01.2228	400001	01.1251	410006	01.2013
390080	01.1759	390146	01.1472	390200	01.0256	400002	01.2155	410007	01.3663
390081	01.1838	390147	01.1417	390201	01.3212	400003	01.1122	410008	01.0749
390083	01.1757	390148	01.0684	390203	01.2632	400004	01.1134	410009	01.1879
390084	01.1189	390149	01.1996	390204	01.1795	400005	01.0127	410010	00.9767
390086	01.1317	390150	01.1230	390205	01.1437	400006	01.1553	410011	01.1290
390088	01.2968	390151	01.2054	390206	01.2294	400007	01.0611	410012	01.3444
390090	01.5475	390152	01.0908	390209	01.0167	400008	01.0262	410013	01.1153
390091	01.1124	390153	01.1701	390211	01.1242	400009	00.9502	410014	01.1188
390092	01.1274	390154	01.1190	390213	00.9916	400010	00.8847	410016	01.0227
390093	01.1269	390155	01.2693	390215	01.1715	400011	01.0151	420002	01.2710
390095	01.2592	390156	01.2386	390217	01.0683	400012	00.9830	420003	01.1156
390096	01.2036	390157	01.1341	390219	01.1972	400013	00.9202	420004	01.7233
390097	01.3270	390158	01.2341	390220	01.1982	400014	01.2242	420005	01.0612
390098	01.5411	390159	01.1596	390222	01.2192	400016	01.1895	420006	01.2459
390100	01.5770	390160	01.1434	390223	01.5627	400017	01.0034	420007	01.4408
390101	01.2043	390161	01.0894	390224	00.9088	400018	01.0062	420009	01.1988
390102	01.2268	390162	01.1809	390225	01.2610	400019	01.0886	420010	01.0227
390103	01.0624	390163	01.1540	390226	01.4705	400021	01.3263	420011	01.0696
390104	01.1706	390164	01.4899	390228	01.2003	400022	01.1878	420014	01.0676
390106	01.0322	390165	01.0958	390229	01.2989	400023	00.5717	420015	01.1120
390107	01.1652	390166	01.1338	390231	01.2635	400024	01.0406	420016	01.0382
390108	01.2343	390167	01.1625	390232	01.1195	400025	00.9553	420017	01.0197
390109	01.2248	390168	01.1605	390233	01.2259	400026	00.9779	420018	01.5038
390110	01.1609	390169	01.1803	390234	01.3150	400027	01.0611	420019	01.1161
390111	01.5825	390170	01.5741	390235	01.6145	400028	01.0163	420020	01.1388
390112	01.1226	390171	01.0824	390236	01.0793	400029	01.1009	420022	01.2095
390113	01.1794	390172	01.1199	390237	01.4128	400032	01.0553	420023	01.1711
390114	01.0187	390173	01.0969	390238	00.8670	400087	01.1487	420026	01.6344
390116	01.1987	390174	01.4855	390242	01.1704	400088	00.7892	420027	01.1307
390117	01.0625	390176	01.1048	390244	00.9201	400089	00.9742	420028	00.9941
390118	01.0858	390178	01.3202	390245	01.2571	400090	01.0400	420029	01.4351
390119	01.2124	390179	01.1934	390246	01.1156	400094	01.0042	420030	01.0843
390121	01.1933	390180	01.2559	390247	01.0616	400098	01.0027	420031	00.9273
390122	01.1112	390181	01.0780	390249	01.0926	400102	01.1409	420032	00.9670
390123	01.1827	390183	01.0877	390252	00.9553	400106	00.9730	420033	01.2314
390125	01.1557	390184	01.0885	390256	01.5966	400109	01.0307	420035	00.7530
390126	01.1840	390185	01.1734	390258	01.1709	400111	01.0435	420036	01.1498

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
420037	01.2072	430011	01.2367	440005	00.9741	440068	01.0608	440153	00.9072
420038	01.0168	430012	01.2206	440006	01.2140	440069	01.1786	440156	01.2045
420039	01.0852	430013	01.1218	440007	00.9742	440070	00.9428	440157	00.8618
420040	01.2113	430014	01.1859	440008	01.0197	440072	01.1189	440159	01.1659
420042	01.0619	430015	01.0692	440009	00.9796	440073	01.1616	440160	00.9943
420043	01.0862	430016	01.2583	440010	01.0073	440074	00.9255	440161	01.4440
420044	01.1061	430017	01.1471	440011	01.2228	440078	00.9158	440162	01.0773
420048	01.0083	430018	00.9374	440012	01.2148	440079	00.8233	440166	01.2439
420049	01.0498	430020	00.9559	440014	00.9472	440081	01.1289	440167	01.1474
420050	00.9785	430022	00.9151	440015	01.4255	440082	01.6104	440168	00.9984
420051	01.4088	430023	00.9270	440016	00.9920	440083	00.8872	440170	01.2196
420053	01.1172	430024	01.0184	440017	01.2594	440084	01.1015	440171	00.9873
420054	01.1167	430025	00.9820	440018	01.1167	440087	00.8880	440173	01.1285
420055	01.0294	430026	00.9692	440019	01.4133	440090	00.9906	440174	00.9177
420056	01.1437	430027	01.5753	440020	01.0237	440091	01.2807	440175	01.0251
420057	01.0924	430028	00.9743	440022	01.1011	440095	00.9679	440176	01.1385
420059	01.1147	430029	00.9064	440023	00.9304	440100	01.0390	440177	00.9051
420061	01.0509	430030	01.0336	440024	01.1068	440102	01.0260	440178	01.1724
420062	01.0776	430031	00.9391	440025	01.0668	440103	01.0897	440180	00.9542
420064	01.0449	430033	00.9984	440026	01.1444	440104	01.3647	440181	01.0186
420065	01.1970	430034	01.0694	440029	01.1820	440105	00.8537	440182	00.9045
420066	00.9522	430036	01.0670	440030	01.0610	440109	01.0612	440183	01.2291
420067	01.0984	430037	00.9133	440031	01.0204	440110	01.0025	440184	01.0983
420068	01.1708	430038	01.0871	440032	00.9680	440111	01.1936	440185	01.0878
420069	01.0062	430039	00.9772	440033	01.0497	440113	01.0888	440186	00.9992
420070	01.1623	430040	00.9671	440034	01.2267	440114	01.0104	440187	00.9460
420071	01.1999	430041	00.9949	440035	01.1411	440115	01.0561	440189	01.4024
420072	00.8729	430042	00.9903	440038	00.9364	440117	00.8828	440191	01.1065
420073	01.1796	430043	01.0662	440039	01.4833	440120	01.2081	440192	01.0630
420074	00.9982	430044	00.8900	440040	00.9028	440121	01.1294	440193	01.0764
420075	00.9996	430047	01.0803	440046	01.0295	440125	01.2029	440194	01.0958
420076	01.0510	430048	01.0635	440047	00.9286	440130	01.1159	440196	00.9940
420078	01.3855	430049	00.9102	440048	01.3071	440131	01.0418	440197	01.2988
420079	01.3360	430054	00.9295	440049	01.3374	440132	00.9800	440200	00.9935
420080	01.2368	430056	00.9183	440050	01.0647	440133	01.3473	440203	00.9603
420081	01.0195	430057	00.9365	440051	00.9855	440134	01.0545	440204	01.0886
420082	01.2893	430060	01.0297	440052	00.8776	440135	01.1794	450002	01.2255
420083	01.1806	430062	00.8933	440053	01.1716	440136	01.0946	450004	01.0913
420084	00.7131	430064	00.9813	440054	00.9543	440137	01.0490	450005	00.9924
420085	01.2204	430065	00.9102	440055	01.0508	440141	00.9559	450007	01.2959
420086	01.1751	430066	01.0230	440056	00.9405	440142	00.8524	450008	01.2581
420087	01.3211	430072	01.1075	440057	00.9373	440143	00.9854	450010	01.2079
420088	01.1542	430073	01.0584	440058	01.0514	440144	01.0448	450011	01.2314
420089	01.1721	430076	01.0349	440059	01.0788	440145	00.9618	450013	01.3306
430004	01.0255	430077	01.2937	440060	01.0396	440146	00.9481	450014	01.0483
430005	01.1707	430080	00.9065	440061	01.1327	440147	00.8323	450015	01.3842
430007	01.0480	430087	00.8628	440063	01.1841	440148	00.9997	450016	01.3972
430008	01.1949	440001	01.0439	440064	00.9513	440150	01.2045	450018	01.3617
430009	01.0636	440002	01.3256	440065	01.0208	440151	01.1002	450019	01.1681
430010	00.9612	440003	01.0827	440067	01.0867	440152	01.3450	450020	01.0698

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
450021	01.5173	450082	01.0157	450150	01.0788	450221	01.0819	450320	01.2249
450022	00.9913	450083	01.3159	450151	01.0682	450222	01.2520	450321	01.0157
450023	01.3570	450084	01.1260	450152	01.2816	450224	01.1124	450322	00.8863
450024	01.1998	450085	01.0931	450153	01.3613	450229	01.3371	450324	01.3594
450025	01.3912	450087	01.2969	450154	01.1825	450230	01.0773	450325	01.2158
450027	01.1170	450090	01.2182	450155	01.2511	450231	01.4142	450327	00.9635
450028	01.2507	450092	01.2917	450157	01.1054	450233	00.9861	450328	00.9693
450029	01.1955	450094	01.1768	450160	00.8550	450234	00.9524	450330	01.1962
450031	01.1866	450095	01.1103	450162	01.3935	450235	01.2193	450331	01.0263
450032	01.1725	450096	01.4080	450163	01.0722	450236	01.0740	450332	01.2406
450033	01.4960	450097	01.2774	450164	00.9872	450237	01.3607	450334	01.0228
450034	01.4045	450098	01.0770	450165	01.0543	450239	01.1225	450337	01.0310
450035	01.3621	450099	01.1718	450166	01.0386	450241	00.9740	450338	01.2604
450037	01.2547	450101	01.2556	450169	00.9109	450242	01.0587	450340	01.2113
450039	01.1473	450102	01.4001	450170	01.1451	450243	00.9697	450341	00.9250
450040	01.4546	450104	01.1344	450174	01.1537	450246	00.9801	450342	00.9662
450041	01.0079	450107	01.2258	450175	01.1241	450248	01.0771	450343	01.1102
450042	01.4779	450108	01.0467	450176	01.1262	450249	01.0059	450346	01.2473
450043	01.2170	450109	01.0258	450177	01.1062	450250	00.9890	450347	01.1493
450044	01.5300	450110	01.2068	450178	00.9978	450253	01.0504	450348	01.0829
450045	01.1834	450111	01.2934	450179	01.0619	450256	00.9680	450349	01.2703
450046	01.2931	450112	01.1975	450181	00.9637	450258	00.8999	450351	01.2843
450047	01.1247	450113	01.0796	450182	00.8937	450259	01.1182	450352	01.1988
450048	01.0667	450115	01.1201	450183	01.1677	450263	01.1398	450353	01.1930
450050	01.0380	450116	01.0753	450184	01.3536	450264	00.9343	450355	01.0045
450051	01.5758	450118	01.3014	450185	00.9869	450268	01.1293	450357	01.1848
450052	01.1163	450119	01.2064	450187	01.3319	450269	01.0062	450358	01.6608
450053	01.0392	450121	01.2064	450188	01.0400	450270	01.0474	450359	00.8300
450054	01.4780	450122	00.9723	450190	01.1988	450271	01.1573	450362	01.0031
450055	01.1552	450123	01.1624	450191	01.2438	450272	01.1638	450365	01.0897
450056	01.3780	450124	01.4337	450192	01.0885	450275	01.0092	450366	01.2853
450057	01.1707	450126	01.2616	450193	02.0452	450276	01.0645	450369	01.1478
450058	01.3650	450128	01.2428	450194	01.1018	450278	00.9469	450370	01.0816
450059	01.2039	450130	01.3619	450195	01.2349	450280	01.2739	450371	01.0777
450060	01.2856	450131	01.1668	450196	01.2444	450281	01.3650	450372	01.2583
450063	01.0024	450132	01.3408	450197	01.1557	450283	01.0374	450373	01.0820
450064	01.3651	450133	01.2105	450200	01.2234	450286	01.2038	450374	00.8477
450065	01.0309	450134	01.1586	450201	01.0528	450288	01.1443	450376	01.3426
450066	01.3767	450135	01.3864	450203	01.1659	450289	01.1172	450378	01.2744
450068	01.3425	450137	01.1864	450206	01.0481	450292	01.1499	450379	01.3962
450070	01.0799	450140	00.9603	450207	01.1799	450293	00.9842	450381	01.0756
450072	01.1157	450141	00.9632	450208	01.1261	450296	01.0336	450388	01.4323
450073	01.0849	450142	01.1657	450209	01.2121	450299	01.2699	450389	01.1523
450074	01.1169	450143	01.0568	450210	01.1043	450303	00.9588	450391	01.1553
450076	01.1237	450144	01.1308	450211	01.1623	450305	00.8652	450393	01.2811
450077	00.9797	450145	01.0474	450213	01.2404	450306	01.0979	450394	01.1738
450078	01.0582	450146	00.9021	450214	01.1189	450307	01.1620	450395	01.0700
450079	01.3315	450147	01.2405	450217	01.0366	450309	01.1542	450399	01.0370
450080	01.1682	450148	01.2279	450218	01.0785	450315	01.2856	450400	01.1528
450081	01.1256	450149	01.2698	450219	01.0796	450317	00.9540	450403	01.2841

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: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

TABLE 3D : HOSPITAL CASE MIX INDEXES FOR COST REPORTING PERIODS BEGINNING IN FY1987 PAGE 21 OF 23

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
450410	01.0500	450537	01.1918	450629	00.7779	450698	00.9036	460021	01.2185
450411	01.0506	450538	01.3057	450630	01.5312	450700	00.9723	460022	00.9975
450415	01.1373	450539	01.1908	450631	01.5240	450702	01.2440	460023	01.1351
450416	01.2190	450544	01.2109	450632	00.9251	450703	01.0875	460024	01.0020
450417	00.9174	450545	01.2856	450633	01.4349	450704	01.1744	460025	00.9249
450418	01.2794	450546	01.2404	450634	01.2052	450705	00.9396	460026	00.9841
450419	01.1955	450547	00.9613	450635	01.2702	450706	01.1987	460027	00.9117
450422	00.7865	450550	01.1261	450638	01.3840	450709	01.1294	460029	00.9286
450423	01.1947	450551	01.0152	450639	01.2232	450711	01.3448	460030	01.0626
450424	01.1079	450557	00.9970	450641	00.9146	450712	00.8095	460032	00.9998
450425	00.9875	450558	01.6413	450643	01.1135	450713	01.1874	460033	00.9097
450429	00.9838	450559	00.9888	450644	02.3840	450715	01.2138	460035	00.9523
450431	01.3545	450561	01.3221	450646	01.1861	450716	01.1277	460036	00.9619
450438	01.2137	450563	01.1452	450647	01.6844	450717	01.1950	460037	00.9739
450440	00.9148	450565	01.1407	450648	01.1230	450718	01.1296	460039	00.9044
450446	00.9762	450568	01.0259	450649	01.0119	450719	01.0880	460041	01.1858
450447	01.2435	450569	01.0644	450651	01.3982	450723	01.2205	460042	01.2806
450450	01.0344	450570	01.0050	450652	00.9581	450724	01.3433	460043	01.2245
450451	01.1956	450571	01.2702	450653	01.3225	450725	00.8773	460044	01.1416
450454	00.9503	450573	01.1007	450654	01.0180	450726	00.9649	460046	01.1079
450457	01.4254	450574	00.9224	450656	01.1857	450727	01.1857	470001	01.1489
450458	00.9158	450575	01.0818	450658	01.0108	450728	01.0816	470003	01.6099
450460	01.0071	450578	00.9814	450659	01.3612	450729	00.9720	470004	01.0813
450462	01.3690	450580	01.1254	450660	01.4812	450730	01.2971	470005	01.1945
450464	00.9543	450581	01.1325	450661	01.0309	450732	01.0226	470006	01.1404
450465	01.1372	450583	00.9969	450665	01.1010	450733	01.1982	470008	01.1337
450467	01.1069	450584	01.2319	450666	01.2779	450734	01.1446	470010	01.0926
450469	01.2444	450586	01.1638	450667	00.9445	450735	00.9138	470011	01.2409
450472	01.1642	450587	01.1785	450668	01.4009	450737	00.9416	470012	01.1606
450473	01.0253	450590	00.9148	450670	01.1317	450739	01.1608	470013	01.0624
450475	01.1381	450591	01.1155	450672	01.3892	450742	01.2153	470015	01.1572
450476	00.9701	450596	01.1276	450673	01.0255	460001	01.4939	470016	01.0441
450481	01.0198	450597	01.1134	450674	00.9617	460003	01.4526	470018	01.0930
450484	01.1480	450600	00.9925	450675	01.1519	460004	01.4497	470020	00.9849
450486	01.0151	450603	00.8612	450677	01.2658	460005	01.2550	470023	01.2368
450488	01.0346	450604	01.2166	450678	01.2920	460006	01.2075	470024	01.1140
450489	01.1469	450605	01.2048	450679	00.9839	460007	01.1671	490001	00.9479
450492	00.9847	450607	00.9997	450681	01.4409	460008	01.1703	490002	00.9389
450493	00.9861	450609	01.0110	450682	01.1778	460009	01.5022	490003	00.7651
450497	01.1823	450610	01.2879	450683	01.2908	460010	01.7114	490004	01.1869
450498	00.9523	450613	01.0520	450684	01.1966	460011	01.1337	490005	01.2719
450508	01.2749	450614	01.0337	450685	01.2121	460012	01.4163	490006	01.1572
450513	00.9869	450615	00.9932	450686	01.3122	460013	01.4315	490007	01.5827
450514	01.1083	450617	01.3618	450687	01.0987	460014	01.0885	490008	01.0328
450517	00.9885	450620	01.2280	450688	01.1103	460015	01.2163	490009	01.5216
450518	01.1524	450621	01.0121	450690	01.2262	460016	00.8987	490010	01.1421
450523	01.3206	450623	01.0187	450691	01.2584	460017	01.2709	490011	01.1865
450530	01.2284	450626	01.1676	450694	01.1624	460018	00.8813	490012	01.0920
450534	00.9719	450627	01.1332	450696	01.2160	460019	01.0697	490013	01.0815
450535	01.2012	450628	00.9771	450697	01.2648	460020	00.9857	490014	01.4038

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
490015	01.2335	490088	01.0749	500015	01.2248	500075	01.2624	510012	01.0609
490017	01.2516	490089	00.9967	500016	01.3459	500076	01.2865	510013	01.1178
490018	01.0953	490090	01.1650	500017	01.1745	500077	01.2213	510014	01.1645
490019	01.1373	490091	01.2181	500019	01.1464	500078	01.2571	510015	00.9668
490020	01.0197	490092	01.0880	500020	01.2186	500079	01.1411	510016	00.9906
490021	01.1066	490093	01.1899	500021	01.3496	500080	00.9561	510018	01.1223
490022	01.2028	490094	01.0793	500023	01.1358	500084	01.1269	510019	00.8780
490023	01.1382	490095	01.1936	500024	01.3214	500085	01.0409	510020	01.0527
490024	01.4047	490097	01.0840	500025	01.8917	500086	01.2730	510022	01.4006
490027	01.0381	490098	01.2012	500026	01.2476	500087	01.2476	510023	01.0197
490028	01.1406	490099	01.0609	500027	01.4868	500088	01.2773	510024	01.1852
490029	01.0819	490100	01.2293	500028	00.9678	500089	01.0904	510025	00.9405
490030	01.1490	490101	01.0901	500029	00.9462	500090	00.8906	510026	00.9656
490031	01.0601	490104	00.8512	500030	01.3436	500092	01.0688	510027	01.1060
490032	01.6038	490105	00.8645	500031	01.1683	500093	01.1297	510028	01.1014
490033	01.1914	490106	00.9408	500033	01.2590	500094	01.1652	510029	01.1290
490035	01.0502	490107	01.1371	500034	01.0630	500096	01.1415	510030	01.0845
490037	01.0796	490108	00.9423	500035	01.3385	500097	01.0295	510031	01.1744
490038	01.1073	490109	00.8442	500036	01.2087	500098	00.8900	510033	01.1900
490040	01.1883	490110	01.0472	500037	01.0752	500100	01.0634	510035	00.9627
490041	01.1376	490111	01.0578	500039	01.2103	500101	00.9330	510036	01.1656
490042	01.1363	490112	01.4024	500040	01.1557	500102	00.9871	510038	01.0643
490043	01.1417	490113	01.0776	500041	01.2157	500104	01.1747	510039	01.1453
490044	01.1636	490114	01.0443	500042	01.2139	500106	00.8779	510040	01.0102
490045	01.1253	490115	01.0595	500043	01.1359	500107	01.1233	510043	01.0647
490046	01.2324	490116	01.0471	500044	01.7901	500108	01.6028	510045	00.8546
490047	01.1093	490117	00.9860	500045	01.1417	500109	01.1229	510046	01.2810
490048	01.2023	490118	01.4439	500046	01.2746	500110	01.2335	510047	01.1705
490050	01.1690	490119	01.2194	500048	00.8947	500114	01.2893	510048	01.1111
490052	01.3321	490120	01.2442	500049	01.2346	500118	01.1931	510050	01.1510
490053	01.2049	490122	01.1471	500050	01.1491	500119	01.2542	510053	00.9994
490054	01.0793	490123	01.1031	500051	01.3726	500122	01.2577	510054	00.9034
490055	00.8856	490124	01.2198	500053	01.1122	500123	00.8361	510055	01.1826
490057	01.1876	490125	00.9572	500054	01.7028	500124	01.2393	510058	01.1903
490059	01.2713	490126	01.1030	500055	01.0040	500125	01.2434	510059	00.8316
490060	01.0082	490127	01.0233	500057	01.1932	500129	01.5164	510060	01.1223
490063	01.3814	490129	01.0499	500058	01.2598	500132	00.9727	510061	01.0431
490066	01.0359	490130	01.1495	500059	01.2549	500133	01.1469	510062	01.1250
490067	01.1135	490131	00.9183	500060	01.1096	500135	01.1551	510063	01.2277
490069	01.1725	500001	01.3090	500061	01.1017	500139	01.1500	510064	01.0663
490071	01.1602	500002	01.3322	500062	01.0217	510001	01.3715	510065	01.0075
490073	01.1557	500003	01.2474	500064	01.4033	510002	01.1586	510066	01.0958
490074	01.2634	500005	01.5250	500065	01.1387	510003	01.0665	510067	01.1553
490075	01.1711	500007	01.2742	500068	00.9845	510004	01.0003	510068	01.1123
490077	01.1260	500008	01.9605	500069	01.0206	510005	00.9895	510070	01.1219
490078	00.9311	500009	01.2840	500070	01.0996	510006	01.1871	510071	01.2529
490079	01.1091	500010	01.1657	500071	01.0947	510007	01.2848	510072	01.1053
490083	00.7464	500011	01.2084	500072	01.1755	510008	01.1588	510074	00.9492
490084	01.0591	500012	01.3834	500073	01.1381	510009	01.1057	510076	00.9475
490085	01.0518	500014	01.5119	500074	01.1857	510011	00.9010	510077	00.9974

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

TABLE 3D : HOSPITAL CASE MIX INDEXES FOR COST REPORTING PERIODS BEGINNING IN FY1987 PAGE 23 OF 23

PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX	PROVIDER	CASE MIX
510080	00.9437	520051	01.6768	520116	01.1119	530006	01.0903		
510081	01.0151	520053	01.0491	520117	01.0240	530007	01.1810		
510082	00.9709	520054	01.1011	520118	00.9370	530008	01.0768		
510084	00.9699	520056	01.1258	520120	01.0173	530009	01.0392		
510085	01.1383	520057	01.0850	520121	01.0274	530010	01.0686		
510086	01.0004	520058	01.0907	520122	01.0129	530011	01.1873		
520001	01.2564	520059	01.2320	520123	01.0765	530012	01.4136		
520002	01.2540	520060	01.1432	520124	01.0952	530014	01.1296		
520003	01.1329	520062	01.1916	520126	00.9266	530015	01.1064		
520004	01.2628	520063	01.2328	520127	00.9422	530016	01.1172		
520006	01.0985	520064	01.3930	520130	00.9797	530017	00.9429		
520007	01.0683	520066	01.1874	520131	01.0939	530018	01.0423		
520008	01.1746	520068	00.9821	520132	01.1962	530019	00.9077		
520009	01.3156	520069	01.2111	520134	01.0401	530022	01.0237		
520010	01.0721	520070	01.2540	520135	00.9544	530023	00.9157		
520011	01.1012	520071	01.1394	520136	01.3746	530024	01.0068		
520012	00.9831	520074	01.0801	520138	01.6740	530025	01.2337		
520013	01.2198	520075	01.2845	520139	01.2532	530026	01.1011		
520014	01.1754	520076	01.1756	520140	01.3105	530027	00.9788		
520015	01.1966	520077	01.0775	520141	01.0120	530029	01.0934		
520016	01.0373	520078	01.2193	520142	00.9465	530031	00.9567		
520017	01.1046	520081	01.2206	520143	01.0334	530032	00.9759		
520018	01.1005	520082	01.2150	520144	00.9892				
520019	01.1881	520083	01.4238	520145	01.0671				
520020	01.3339	520084	01.0724	520146	01.1752				
520021	01.1635	520087	01.4048	520148	01.1442				
520022	01.0612	520088	01.1729	520149	01.0785				
520024	00.9991	520089	01.2566	520151	01.0116				
520025	01.0975	520090	01.1199	520152	01.1309				
520026	01.0899	520091	01.3479	520153	01.0399				
520027	01.1958	520092	01.1165	520154	01.1236				
520028	01.3055	520094	01.3587	520156	01.0896				
520029	00.9801	520095	01.2119	520157	01.0499				
520030	01.3711	520096	01.1669	520159	00.9490				
520031	01.1672	520097	01.2411	520160	01.6914				
520032	01.1610	520098	01.5468	520161	01.0327				
520033	01.1988	520100	01.1087	520167	01.1716				
520034	01.2232	520101	01.1224	520170	01.1499				
520035	01.1610	520102	01.1134	520171	00.9675				
520037	01.5429	520103	01.2561	520173	01.1305				
520038	01.1756	520104	00.8933	520174	01.3299				
520039	01.0417	520105	00.9702	520175	00.7773				
520040	01.2548	520107	01.1882	520177	01.3250				
520041	01.0950	520109	01.0349	520178	01.2083				
520042	01.0851	520110	01.0468	520184	00.7029				
520044	01.2866	520111	01.0995	530001	01.0927				
520045	01.4440	520112	01.0898	530002	01.1657				
520047	00.9605	520113	01.1869	530003	00.9091				
520048	01.2729	520114	01.1055	530004	01.0428				
520049	01.6844	520115	01.1455	530005	01.0684				

NOTE: CASE MIX INDEXES DO NOT INCLUDE DISCHARGES FROM PPS-EXEMPT UNITS.
: CASE MIX INDEXES INCLUDE CASES RECEIVED IN HCFA CENTRAL OFFICE THROUGH NOVEMBER 1989.

[FR Doc. 90-9208 Filed 4-17-90; 1:43 pm]
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federal register

Friday
April 20, 1990

Part VI

The President

Proclamation 6116—National Farm Safety Week, 1990

Memorandum of April 18, 1990—Delegation of Authority To Ratify Office of Thrift Supervision Actions Taken Before April 9, 1990

Digest

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Presidential Documents

Title 3—

The President

Proclamation 6116 of April 18, 1990

National Farm Safety Week, 1990

By the President of the United States of America

A Proclamation

During the 1990's, our Nation's strength and prosperity will largely depend—as they have in the past—upon a strong agricultural base. The abundance of low-cost, high-quality food and fiber produced by our farmers and ranchers is vital to sustaining the health and well-being of the American people, as well as the Nation's economic productivity and competitiveness.

Tragically, however, those Americans engaged in agricultural production continue to bear a high rate of accidental death, injury, and illness. The costs in terms of lost productivity are enormous; the toll in personal suffering and loss is immeasurable.

Far too many farming and ranching accidents involve children, who are at increased risk from workplace hazards. Compounding the severity of many farming-related injuries and illnesses is the geographic distance of farms and ranches from municipal emergency assistance. When an accident, fire, or other crisis occurs, the time that must be spent waiting for help can make a situation life-threatening. Injuries and death from occupational accidents and illnesses are all the more tragic because most are preventable.

Advances in science and technology have made agricultural tools and chemicals safer, but these advances alone cannot eliminate all the safety risks of farming. As always, farmers and ranchers, workers, and their family members must take responsibility for implementing the steps necessary to establish and maintain a safe and healthy farming or ranching operation.

Work-related injuries and illness often can be prevented through simple, sensible measures that involve little or no extra time, effort, or expense. These measures include the proper and consistent use of standard protective equipment; controlling exposure to toxic chemicals and gases; and training everyone on the ranch or farm in safety procedures and first aid.

The busy harvest season is a most fitting time to express our concern and our appreciation for the Nation's farmers and ranchers. During National Farm Safety Week, we renew our support for programs designed to protect their health and safety. All of these hardworking Americans should be able to reap the fruits of their labor with a sense of achievement and security.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim the week of September 16 through September 22, 1990, as National Farm Safety Week. I urge all persons who live and work on farms and ranches to make their safety and health—on the job, on the road, at home, and at leisure—a priority. I also urge them to protect their children, not only by instruction in safe practices but also by personal example. I call upon agricultural organizations to strengthen their support for community health and safety programs, and I encourage all Americans to take part in appropriate activities in observance of National Farm Safety Week as we acknowledge the many contributions that men and women in agriculture make to our Nation.

IN WITNESS WHEREOF, I have hereunto set my hand this eighteenth day of April, in the year of our Lord nineteen hundred and ninety, and of the Independence of the United States of America the two hundred and fourteenth.

George Bush

[FR Doc. 90-9451
Filed 4-19-90; 12:29 pm]
Billing code 3195-01-M

Presidential Documents

Memorandum of April 18, 1990

Delegation of Authority To Ratify Office of Thrift Supervision Actions Taken Before April 9, 1990

Memorandum for the Director of the Office of Thrift Supervision

By the authority vested in me as President of the United States by the Constitution and laws of the United States, including section 301 of title 3 of the United States Code, I hereby delegate to the Director of the Office of Thrift Supervision my authority to ratify actions taken on behalf of, or in the name of, the Office of Thrift Supervision or its Director before April 9, 1990.

This memorandum shall be published in the **Federal Register**.

George Bush

THE WHITE HOUSE,
Washington, April 18, 1990

[FR Doc. 90-9435
Filed 4-19-90; 11:29 am]
Billing code 3195-01-M

federal register

Friday
April 20, 1990

Part VII

Department of Health and Human Services

Centers for Disease Control

Requirement for a Special Permit To Import Cynomolgus, African Green, or Rhesus Monkeys Into the United States; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers For Disease Control

Requirement for a Special Permit to Import Cynomolgus, African Green, or Rhesus Monkeys into the United States

AGENCY: Centers for Disease Control (CDC), Public Health Service, HHS.

ACTION: Notice of CDC Requirement for Special Permit to Import Cynomolgus, African Green, and Rhesus Monkeys into the United States.

SUMMARY: Effective immediately, no person may import into the United States, nor distribute out of quarantine, any cynomolgus (*Macaca fascicularis*), African green (*Cercopithecus aethiops*), or rhesus (*Macaca mulatta*) monkeys unless accompanied by a special permit issued in advance by the Director, CDC. This special permit requirement is separate from, and in addition to, continued compliance with existing regulations pertaining to the importation of nonhuman primates which are contained in 42 CFR 71.53, including the isolation and quarantine measures made mandatory on March 15, 1990.

This special permit procedure, authorized under Sections 361 to 368 of the Public Health Service Act and 42 CFR 71.54, is based upon the current determination by the Director, CDC, that these three species of monkeys are capable of being an animal host or vector of human disease. In order to receive a special permit to import any of these three species of primates, at least thirty days prior to proposed importation, a registered importer of nonhuman primates must submit to the Director, CDC, a written plan which specifies the steps that will be taken to prevent exposure of persons and animals during the entire importation and quarantine process for the arriving nonhuman primates. Importation cannot occur until receipt of written approval of the plan by the Director, CDC.

BACKGROUND: Beginning in November 1989, a number monkeys imported into the United States were found to have been infected with a filovirus related to Ebola virus from Africa. This virus has been isolated directly from cynomolgus monkey blood and tissues and antibody to the virus has been detected in cynomolgus, African green, and rhesus monkeys.

On January 19, 1990, CDC published in the *Morbidity and Mortality Weekly Report* (MMWR) interim guidelines for handling nonhuman primates during transit and quarantine (MMWR 1990;39:22–4,29–30). Based upon additional developments during the next two months, CDC notified all importers by letter of March 15, 1990, that compliance with these isolation and quarantine standards was made a mandatory condition for continued registration as an importer of nonhuman primates under 42 CFR part 71. On March 23, 1990, an announced public meeting (55 FR 10288) was held in Atlanta, Georgia, to allow all interested parties to comment concerning (1) actions taken to date to prevent the importation of filoviruses into the United States and their transmission to animal handlers; (2) potential impact of the imposition of a temporary ban on the importation into the United States of cynomolgus monkeys; and (3) additional disease control measures.

On April 4, 1990, CDC reported that four animal handlers at a quarantine facility in the United States had demonstrated serologic evidence of recent infection with the strain of this virus isolated from infected cynomolgus monkeys (MMWR 1990;39:30).

Recent serologic evidence indicates that approximately 5–10% of cynomolgus, African green, and rhesus monkeys coming into the United States have previously been infected with a filovirus—this is true irrespective of their origins in Africa or Asia (Philippines, Indonesia, and China).

Considering information currently available, CDC concludes that these three species are capable of being an animal host or vector of human disease. Until further information can obtained about the risk of human illness following infection and about the means of transmission of filoviruses from monkeys to humans, public health practice requires that more stringent precautions now be applied with respect to the importation of these three species.

IMPLEMENTATION PROCEDURES: Under the authority of section 362 of the Public Health Service Act (42 U.S.C. 265) and 42 CFR 71.54, and in addition to the provisions of 42 CFR 71.53 for registration of importers of nonhuman primates, effective immediately, no person may import into the United States, nor distribute out of quarantine, any cynomolgus, African green, or rhesus monkeys unless accompanied by a special permit issued in advance by the Director, CDC.

In order to receive a special permit to import any of these three species, no less than thirty days in advance of proposed importation, a registered importer must submit to the Director, CDC, a written plan which specifies the steps that the importer will take to prevent filovirus exposure of persons and animals during the entire importation and quarantine process. CDC will review all special permit plans on a case-by-case basis and will grant approvals in accordance with prudent public health practice at the time of evaluation. Importation cannot occur until receipt of written approval of the plan by the Director, CDC.

The United States Customs Service will not allow entry into the United States of any shipments of these three species of monkeys not accompanied by a copy of the special permit issued by CDC.

SPECIAL PERMIT PLANS: Any plan submitted to CDC by a registered importer for the importation and quarantine of monkeys covered under this special permit arrangement must address disease prevention procedures to be carried out in every step of the chain of custody of such monkeys, from the time of embarkation at the country of origin until delivery of these animals safely out of quarantine.

The elements (referenced by number) to be addressed by any special permit plan must include, at a minimum:

A. Basic Information
1. Number and species of monkeys
2. Origin of monkeys (country, exporter, address)
3. Anticipated use of monkeys—scientific, educational, or exhibition
4. Name and exact location of quarantine facility
5. Means of individually identifying monkeys

B. Transit Information
1. Specific itinerary with names, dates, flights, and responsible parties to contact at every step of travel, including all ground transportation
2. Description of caging
3. Procedures to protect and train transport workers
4. Procedures to prevent contamination of other articles and cargo during transit, including physical separation of cages from other cargo
5. Procedures to decontaminate aircraft, vessel, and/or vehicles following transport
6. Proposed use, if any, of transit holding facilities and steps to be taken to protect workers, as well as animals, from disease exposure at each holding facility to be used en route

C. Isolation and Quarantine Precautions
1. Worker protection plan to include:
a. Written infection-prevention program
b. Hazard evaluation and worker communication procedures
c. Training requirements for workers
d. Infection-prevention methods (e.g., personal protective equipment, work practices, housekeeping)
e. Medical surveillance and medical assessment and treatment of workers

2. Physical security procedures of quarantine area
3. Disinfection procedures for apparel, supplies, equipment, waste, etc., and disposal of remains of dead animals
4. Description of caging and room arrangement
5. Description of procedures to be used to assure the integrity of the isolation of each lot of animals in the quarantine unit
6. Record-keeping and reporting procedures

D. Procedures for testing of quarantined animals
1. Testing at entry into quarantine
2. Testing prior to release from quarantine
3. Record-keeping and reporting procedures
4. Description of laboratory methodology and laboratory to be used
5. Quarantine decision logic if positive serology or seroconversion occurs
6. Post mortem procedures for animals dying during quarantine

E. Such additional information as the importer feels will be useful in reviewing the plan

The Director, CDC, may request clarification or additional information, if needed. CDC anticipates that initial approvals of special permits will be made on a shipment-by-shipment basis. As this process evolves and more experience develops, CDC may subsequently grant special permits on a broader basis for multiple shipments and/or specific intervals of time.

In submitting plans for approval, registered importers should indicate to CDC any specific information that CDC should consider proprietary pertaining to origins of monkeys, customer lists, and similar proprietary information. However, applicants should be aware that CDC intends generally to share publicly large portions of the application in order to expedite dialogue pertaining to the developing technical issues on appropriate quarantine and disease prevention methodology.

CDC recognizes that the lack of current knowledge about certain aspects of the present situation make risk assessment and risk management decisions particularly difficult. Interested parties should realize that as new information becomes available, appropriate disease prevention practices may be altered to reflect such additional input. Since this special permit procedure may also have to be changed to reflect unanticipated developments CDC will make every effort to provide timely communication to the public of pertinent data.

EFFECTIVE DATE: Immediately.

FOR FURTHER INFORMATION OR TO REQUEST SPECIAL PERMITS, CONTACT: Mr. Charles R. McCance (404–639–1455), Director, Division of Quarantine, Centers for Disease Control, Atlanta, Georgia 30333.

Dated: April 17, 1990.

William L. Roper,

Director, Centers for Disease Control.

[FR Doc. 90–9426 Filed 4–19–90; 12:22 pm]

BILLING CODE 4160–18–M

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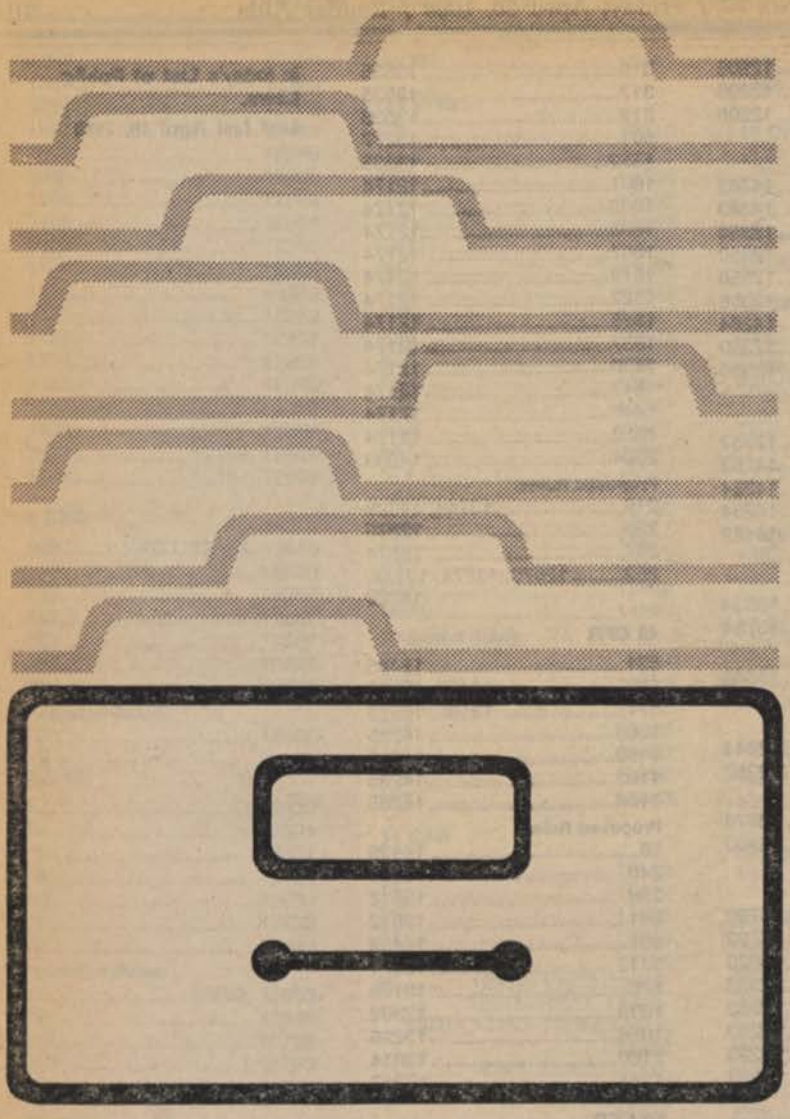
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